



Preventive Confinement: A Suggested Framework for Constitutional Analysis

Citation

Alan M. Dershowitz, Preventive Confinement: A Suggested Framework for Constitutional Analysis, 51 Tex. L. Rev. 1277 (1973).

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:17190390>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

Texas Law Review

Volume 51, Number 7, November 1973

Preventive Confinement: A Suggested Framework for Constitutional Analysis

Alan M. Dershowitz*

A science fiction writer once created a machine called a sanity meter that automatically gauged a person's potential for dangerous conduct.¹ The meter, installed in all public places, registered from zero to ten. A person scoring up to three was considered normal; one scoring between four and seven, while within the tolerance limit, was advised to undergo therapy; one scoring between eight and ten was required to register with the authorities as highly dangerous and to bring his rating below seven within a specified probation period; anyone failing this probationary requirement, or anyone passing the red line above ten, was required either to undergo immediate surgical alteration or to submit himself to the academy—a mysterious institution from which no one returned. The meter was not a diagnostic machine: it measured solely the intensity of an individual's potential for harm, not its underlying cause or amenability to treatment. Since the machine never erred, everyone in the society knew everyone else's danger rating and acted accordingly. Its widespread use finally succeeded in eliminating crime and other social evils.

Although our society is not yet blessed with such a wonderful, error-free device, we do have people who claim the ability to gauge an individual's potential for harm. Indeed, the majority of persons currently confined in American institutions are there, at least in part, be-

* Professor of Law, Harvard University; B.A., Brooklyn College, 1959; LL.B., Yale, 1962. This article is an expanded and slightly revised version of the 1973 Will E. Organ lecture, which Professor Dershowitz delivered at the University of Texas School of Law on March 14, 1973.

1. R. SHECKLEY, *The Academy* in PILGRIMAGE TO EARTH 120-40 (Bantam 1957).

cause of a prediction of their potential for harm.² It is appropriate to ask, therefore, whether the Constitution permits confinement of someone because of a prediction that he may engage in harmful conduct at some future time. While no Supreme Court decision has directly answered that broad question, individual justices have addressed it. For example, Justice Robert Jackson, sitting as Circuit Justice, observed that the "jailing of persons by the courts because of anticipated but as yet uncommitted crimes" could not be reconciled with "traditional American law."³ Similarly, Lord Justice Denning of the Queen's Bench observed about British law that "[i]t would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do."⁴

Leading scholars of the criminal law have also inveighed against preventive confinement. Francis Wharton, for example, argued in his influential *Treatise on Criminal Law* that

[i]f the [preventive] theory be correct, and be logically pursued, then punishment should precede, and not follow, crime. The State must explore for guilty tendencies, and make a trial to consist in the psychological investigation of such tendencies. This contradicts one of the fundamental maxims of English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue.⁵

For every admonition against preventive confinement, however, there have been equally authoritative pronouncements supporting the practice. No less an authority than Blackstone praised preventive confinement as "an honor . . . to our English laws . . . since *preventive* justice is, upon every principle or reason, of humanity, and of social policy, preferable . . . to *punishing* justice" ⁶ Holmes, too,

2. In 1960, 1,887,000 residents of the United States were classified as inmates of institutions. Of these, only 346,000 were incarcerated in correctional institutions, while fully 630,000 resided in mental hospitals. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971 Table 52, at 41 (1971).

3. *Williamson v. United States*, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950), *aff'd on other grounds*, 341 U.S. 494 (1951). Justice Jackson made this sweeping observation in affirming an extension of bail pending appeal to defendants who had been convicted of conspiring to advocate the violent overthrow of the government and who, the Government maintained, might "be expected to" cause "[g]rave public danger" if allowed to remain at liberty. *Id.*

4. *Everett v. Ribbands*, [1952] 2 Q.B. 198, 206 (C.A.). The Lord Justice made this generalization in deciding that the English provision for sureties of the peace required proof of "something actually done" in the past by the person to be confined, rather than a bare prediction of future harm.

5. F. WHARTON, CRIMINAL LAW § 2 (12th ed. 1932) (footnote omitted).

6. 4 W. BLACKSTONE, COMMENTARIES *251 (emphasis in original) [hereinafter

echoed this view. In a celebrated passage from *The Common Law* he argued that "prevention" is the "chief and only universal purpose of punishment," and that "probably most English-speaking lawyers would accept the preventive theory without hesitation."⁷ Nor is the acceptance of preventive confinement limited to Western lawyers. A Justice of the Burma Supreme Court observed that "[p]reventive justice, which consists in restraining a man from committing a crime which he may commit but has not yet committed, is common to all systems of jurisprudence"⁸

Much of the disagreement among these distinguished authorities stems from the generality of their statements. Preventive confinement and its variants, such as preventive justice and preventive detention, are not self-defining concepts. They include a widely divergent variety of confinement mechanisms. For example, the term "preventive detention," as used in the contemporary United States, generally refers to denial of pretrial release to an allegedly dangerous defendant awaiting trial for a crime.⁹ In England, on the other hand, the same term generally refers to the portion of a convicted recidivist's prison sentence that exceeds the term normally imposed for the offense itself.¹⁰ Blackstone's "preventive justice" referred to an ancient practice—still employed in several of the United States—whereby a person who has committed no crime, but who has given rise to suspicion that he may commit a crime, could be preventively confined upon failure to obtain sureties to keep the peace.¹¹ These devices all have a preventive

cited as BLACKSTONE]. Blackstone was referring to the same surety provision that Lord Denning later construed to require "something actually done." *Everett v. Ribbands*, [1952] 2 Q.B. 198 (C.A.). Although Blackstone would have required some "just ground of apprehension," he differed with Denning, concluding that sureties were "intended merely for prevention, without any crime actually committed by the party" 4 BLACKSTONE at *252.

7. O. HOLMES, *THE COMMON LAW* 43, 46 (1881).

8. *Maung Hla Gyaw v. Commissioner*, [1948] Burma L.R. 764, 766.

9. Use of this term in the United States became particularly widespread in connection with the pretrial release and detention provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE §§ 23-1321 to -1322 (1970). See N. BASES & W. McDONALD, *PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS* (1972); *Preventive Detention: An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 289 (1971).

For other provisions restricting or revoking pretrial release, see TEX. CONST. art. I, § 11a; ARIZ. REV. STAT. ANN. § 13-1577(D) (Supp. Aug. 1972); MD. CODE ANN. art. 27, § 616½ (Supp. 1972).

10. See *Regina v. Higginbotham*, [1961] 3 All E.R. 616 (Crim. App.).

11. See *Commonwealth v. Franklin*, 172 Pa. Super. 152, 92 A.2d 272 (1952). The Statute of 34 Edw. 3, c. 1 (1360-1), authorized justices of the peace to "take of all them that be not of good fame" a surety to keep the peace. The Pennsylvania

component in common, but they raise different issues of policy and constitutionality. It is imperative to sound analysis—especially constitutional analysis—that the broad issue be broken down to its component parts.

Blackstone provides a useful starting point for this process of atomization with his astute, if overstated, observation that “if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past.”¹² Broadly conceived, most punishments are designed, at least in part, to prevent future crimes—the preventive component being a matter of degree. Put another way, preventive confinement is a continuum. At one pole is the purely preventive system against which Wharton inveighed: the “psychological” exploration for criminal “tendencies” designed to identify and confine the potential criminal at the earliest possible stage in his life. From the Bible¹³ to the Italian positivists¹⁴ to the Gluecks,¹⁵ there have been those who have advocated preventive measures—from preventive execution to remedial education—against persons who had not yet committed formally punishable acts, but who were predicted to become criminals. At the other pole is the convicted criminal’s sentence of imprisonment. Although formally imposed as punishment for his past crime, it has the important effect of preventing future crimes, at least during the sentence. Between these terminal points on the preventive continuum lie a wide variety of confinement mechanisms embodying different components of prevention.

A recent judicial exchange between the Chief Judge of the D.C. Circuit and the current Chief Justice of the United States illustrates the desirability of viewing preventive confinement as a continuum rather than an absolute concept. The debate between these two distinguished jurists turned, at least in part, on whether the challenged practice could

common law that developed under this statute allowed a judge to require a “bail to keep the peace” even after a person was acquitted of an offense. The court held the statute, on its face, to be contrary to both the Pennsylvania and the United States Constitutions.

12. 4 BLACKSTONE, *supra* note 6, at *252-53.

13. *Deuteronomy* 21:20-21 (King James).

14. Cesare Lombroso claimed to have identified “a group of criminals, born for evil, against whom all social cures break as against a rock” He proposed “to eliminate them completely, even by death.” C. LOMBROSO, *CRIME, ITS CAUSES AND REMEDIES* 447 (1918). Enrico Ferri also wrote of the born criminal and proposed “capital punishment to these unfortunates . . . since they are a continual danger for society” E. FERRI, *CRIMINAL SOCIOLOGY* § 338 (1917).

15. *E.g.*, S. & E. GLUECK, *UNRAVELING JUVENILE DELINQUENCY* (1950).

properly be labeled "preventive detention." In *Cross v. Harris*¹⁶ Chief Judge Bazelon sought to construe the District of Columbia sexual psychopath law to avoid the constitutional questions that would be raised if it were interpreted to authorize preventive detention. "Incarceration for a mere propensity," he argued:

is punishment not for acts, but for status In essence, detention for status is preventive detention.

Only a "blind court" could ignore the intense debate, in and out of Congress, over the extent to which the Constitution can tolerate preventive detention

. . . . Confinement for a mere propensity is preventive detention. Particularly when the act in question is commonly punishable only by a short jail sentence, indefinite confinement, even though labeled "civil," is preventive detention with a vengeance. If required by the Sexual Psychopath Act, it would raise . . . many difficult constitutional issues. . . .¹⁷

Chief Justice (then Judge) Burger, dissenting, disputed Judge Bazelon's characterization of the statute as "preventive detention:"

This is not a case where an individual is being committed solely because of an imagined propensity to engage in *anticipated* conduct obnoxious or offensive to others; thus . . . I do not think we are confronted with a situation involving strictly preventive detention. Appellant's record stipulation that he recently engaged in . . . acts of indecent exposure supplies the basis for commitment to one of the institutions designated by Congress. A civil commitment statute is not rendered constitutionally suspect as a form of preventive detention simply because in a given case the civil confinement may exceed the sentence which could be imposed under a criminal statute for the same acts.¹⁸

Thus both judges seemed to agree that the constitutionality of the statute turned, at least in part, on whether it authorized "preventive detention." They disagreed over whether confinement that rested in part on past acts and in part on propensities toward future acts could properly be characterized as "strictly preventive detention." Neither judge, however, sufficiently recognized that "preventive detention" is not a self-defining or self-limiting category. It is an imprecise label that describes a continuum of devices authorizing intervention at various stages in order to prevent future harm.

16. 418 F.2d 1095 (D.C. Cir. 1969).

17. *Id.* at 1102-03 (footnotes omitted).

18. *Id.* at 1109 (Burger, J., dissenting).

I. Past Acts and Potential Harm

There are a number of logical ways of grouping the mechanisms of preventive confinement.¹⁹ Chief Justice Burger's *Cross* dissent suggests the most obvious: whether the confinement rests "solely" on a "propensity to engage in anticipated conduct,"²⁰ or whether it rests on past acts. But this distinction greatly oversimplifies the issue. Virtually all predictive determinations depend, to some degree, on an assessment of the past. It is a truism that the past is the best predictor of the future. Confinement decisions are no exception: most rest, in whole or part, on assumptions about what the individual did in the past.²¹ The critical issue, therefore, is not whether any past act underlies the preventive confinement—some past act almost always does. The issues are more complex, relating to the nature of the relationship between the past acts and the confinement. Sometimes the formal criteria for confinement require that the past act be defined in advance as a crime; other situations require no prior definition. Sometimes the past act must be formally proved; in other instances it will merely be presumed. Sometimes the past act must be proved to a jury beyond a reasonable doubt; other situations require only that some other decisionmaker—judge, probation officer, or psychiatrist—be "satisfied." The relationship between the duration of confinement and the nature of the proved past act also varies. In some situations the nature of the act alone determines the length of confinement. In others, the act establishes only the limits of confinement; its actual duration depends on either predictive considerations or assumptions about other suspected past acts. In still other situations the past act serves merely to confer jurisdiction—to trigger the state's power to deprive the indi-

19. The *manner* in which the confinement purports to prevent crime could provide one basis for grouping. Wartime national security detention, for example, merely erects a wall between the detainee and others; it does not attempt to reduce inherent dangerousness. The detention of material witnesses, for example, and of those who might jump bail is also intended merely to prevent departure. Other mechanisms seek to alter the detainee's propensity to engage in anticipated conduct through personality modification, education and training, threats, etc. This "treatment" is sometimes used to justify confinement—e.g., "He won't take his pills unless he's an in-patient." Such affirmative aims have constitutional relevance for some authorities. See, e.g., *Cross v. Harris*, 418 F.2d 1095, 1109 (D.C. Cir. 1969) (Burger, J., concurring in part and dissenting in part).

Other possible continua include the extent to which confinement is voluntary or involuntary, the extent to which it involves deprivation of liberty, the extent of deprivation of liberty without confinement, and the duration of confinement.

20. 418 F.2d at 1109-10 (emphasis in original).

21. In some situations individuals have been preventively detained because of assumptions based on their status rather than their acts. Even these assumptions,

Preventive Confinement

vidual of his liberty; the duration of confinement depends primarily on predictive considerations.²²

Despite the complex relationship between the past acts and the duration of confinement, it is possible to construct a continuum that reflects the degree to which the duration of the confinement is based on past acts. As with all continua, an infinite number of points could be identified. For the purposes of analysis, however, three points will be considered: confinement that requires no prior act; confinement based on suspicion of a prior act; and confinement that, while requiring proof of a prior act, exceeds the duration normally associated with a criminal conviction for the same conduct.

A. *Pure Prevention*

Our society has only infrequently confined individuals who were neither proved to have committed some past crime nor suspected of one. The most striking example of pure preventive detention in our national experience was, of course, the internment of 110,000 Japanese-Americans at the beginning of World War II. All Japanese-Americans—a group defined exclusively in blood terms—who lived in specified areas were detained without regard to their prior actions, loyalties, citizenship, or age. The avowed reason for the detention was explicitly preventive: to provide “every possible protection against espionage and . . . sabotage”²³ When this assumed danger abated, however, the preventive rationale changed: the Government attempted, though ultimately without success, to justify continued detention to prevent “community hostility against persons of Japanese ancestry.”²⁴

however, rest largely on suspicion of past acts. See Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967). Racial assumptions, such as those that underlay the confinement of Japanese-Americans during World War II, constitute a striking exception. See A. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* (1967); R. DANIELS, *CONCENTRATION CAMPS U.S.A.: JAPANESE AMERICANS AND WORLD WAR II* (1972).

22. See generally Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36, 52-57 (1970). For an informative discussion of indeterminate sentencing, see M. FRANKEL, *CRIMINAL SENTENCES* 86-103 (1973). See also Dershowitz, *The Indeterminate Sentence as a Mechanism of Preventive Confinement* (to be published by the Ninth Congress of Comparative Law, Teheran, Iran, Sept. 1974).

23. Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

24. *Ex parte Endo*, 323 U.S. 283, 302 (1944).

Throughout history countries have taken preventive action, including administrative detention, during periods of war or national emergency. The British and French, for example, had extensive systems of preventive detention during both World Wars.

The measure taken against the Japanese-Americans differed from other national security detentions because it confined an entire racial group without regard to individual past acts. Although the Supreme Court gave weight to the judgment of both the military authorities and the Congress that some of the Japanese-American population were disloyal, it did not require the Government—at least initially—to separate the loyal from the disloyal. Rather, it found that the warmaking branches of government might have believed “that in a critical hour such persons could not be readily isolated and separately dealt with” It therefore sustained the broad, nonselective, racial detention as necessary to prevent “a menace to the national defense and safety.”²⁵

In so doing, the Court made two implicit leaps from the requirement of a past act as a basis for confinement, one of which even the dissenters appeared willing to make. The dissenters implied that they might have approved confinement of selected individuals based on an “inquiry concerning his loyalty and good disposition toward the United States.”²⁶ There is, of course, an enormous distance between “loyalty and good disposition,” on the one hand, and “espionage and sabotage” on the other. The group of disloyal and poorly disposed, however defined, probably would include some potential spies and saboteurs, but surely it would also include many who would not act on their loyalties and dispositions. The other leap, which the dissenters rejected, was from national origin to loyalty and disposition. Though the Constitution arguably protects loyalties and dispositions (at least when unaccompanied by overt acts), they are within the individual’s

The United States also detained some persons of Italian and German ancestry living on the east coast during World War II. Israel, Ireland, and the Philippines currently employ such systems against suspected terrorists. See *Hearings on Preventive Detention and the Bail Reform Act of 1969 Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess. 1170-74 (1970); U.N. Doc. E/CN. 4/826/REV. 1 (1964); Trechsel, *The Reasonable Duration of Preventive Detention*, 4 HUMAN RIGHTS: J. OF INT’L & COMP. L. (Fr.) 119, 150-51 (1971). These detention systems differ, however, from the one directed against the Japanese-Americans because they only authorize detention of persons suspected of hostile association or dangerous activities. The Emergency Detention Act similarly permitted “detention of persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage” during a declared “internal security emergency.” Emergency Detention Act of Sept. 23, 1950, ch. 1024, §§ 101(14), 102, 64 Stat. 1019 (repealed 1971). Although this statute, like other emergency regulations, employed purely preventive criteria, Congress explicitly designed it to use against persons suspected of past acts that could not, for one reason or another, support a criminal conviction. *Id.* § 101(9); see H.R. REP. No. 2980, 81st Cong., 2d Sess. 2 (1950).

25. *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

26. *Korematsu v. United States*, 323 U.S. 214, 226 (1944) (Roberts, J., dissenting).

Preventive Confinement

control; despite the Gilbert and Sullivan ditty about the sailor who chose to be an Englishman,²⁷ national origin is not.

The confinement of Japanese-Americans during World War II presents a dramatic example of pure preventive confinement. There are other examples, though perhaps none provides as clear an instance of pure preventive confinement. While the majority of confined juveniles probably have committed, or are suspected of having committed, criminal or nuisance acts, a significant number of the young persons in institutions today are suspected of no past delinquencies. They are confined because of the inadequacy of their home situations.²⁸ These children are preventively confined in a "pure" sense. The preventive rationale is multifaceted. In part, confinement serves merely to shift custody from the family to the state. It constitutes a convenient alternative to a nonexistent or inadequate family; if a foster family were available, confinement might terminate. In this sense, the preventive aspect of the confinement is limited to the child's exposure to the elements and the world that society deems him incapable of confronting outside a structured environment. In another important respect, however, the confinement is designed to prevent the child from becoming a delinquent or a criminal. This conception dates from the early nineteenth century, well before the development of the juvenile court. Beaumont and de Tocqueville described the dual function of the "houses of refuge" in 1833:

The houses of refuge are composed of two distinct elements: there are received into them young people of both sexes under the age of twenty, condemned for crime; and also those who are sent there by way of precaution, not having incurred any condemnation of judgment

The individuals, who are sent to the houses of refuge without having been convicted of some offense, are boys and girls who are in a position dangerous to society and to themselves: orphans, who have been led by misery to vagrancy;

27. W. GILBERT, *H.M.S. Pinafore*, Act II (Boatswain's Song), in *PLAYS AND POEMS OF W.S. GILBERT* 131 (Random House 1932).

28. See *In re Gault*, 387 U.S. 1, 14-15 n.14, 76 & n.6 (1966). Both the majority and Justice Harlan cite figures indicating that 26% of cases involving approximately 600,000 children brought before juvenile courts in 1965 dealt with conduct that would not be criminal for an adult. Although some of these children may be suspected of delinquency, many are not—some 48% in 10 special studies of children in detention homes or jail awaiting trial. For a full discussion of the studies that developed these figures see Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, 31 *FED. PROB.* 26, 27 (1967).

children, abandoned by their parents and who lead a disordered life; all those, in one word, who, by their own fault or that of their parents, have fallen into a state so bordering on crime, that they would become infallibly guilty were they to retain their liberty²⁹

The confined insane constitute another "mixed" category that includes some persons who have (or are suspected of having) committed past harmful acts and some who have not. The statutes governing the criteria for commitment of the mentally ill generally speak in purely predictive terms: "likely to cause injury to himself or others,"³⁰ or "in danger of causing physical harm to himself or others."³¹ They do not formally require any past criminal or otherwise harmful act, and although past acts of a harmful or disturbing nature may trigger a significant number of commitments, some are not triggered in that way. They are purely preventive in the sense that they are based almost entirely on a psychiatric diagnosis that purports to predict future harmful conduct.

The case of Bong Yol Yang³² provides a striking example of relatively pure preventive confinement of the mentally ill. Bong, an obviously psychotic forty-one year old American of Korean ancestry, appeared at the White House gate asking to see the President or one of his representatives about people who were "revealing his subconscious thoughts." As far as the record shows, Bong had never been arrested or suspected of any crimes; nor was it a crime to ask to see the President or one of his representatives. A psychiatrist testified that, although there was no "evidence of his ever attacking anyone so far," a possibility always existed that "if his frustrations . . . became great enough, he may potentially attack someone" ³³ The psychiatrist also feared that at some future time he might attempt suicide, although there was no evidence of any past attempt.

Bong's involuntary confinement was thus relatively pure prevention: though it was triggered by the act of appearing at the White House, it was based on a psychiatric diagnosis and prediction. Likewise, a large number of mentally ill persons currently confined in men-

29. G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 137-38 (Lantz ed. 1964).

30. TEX. REV. CIV. STAT. ANN. art. 5547, § 27 (Supp. 1972).

31. MASS. GEN. LAWS ch. 123, § 1 (Supp. 1973).

32. *In re Bong Yol Yang* (D.D.C. Nov. 18, 1964), excerpted in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 493 (1967) [hereinafter cited as KATZ, GOLDSTEIN & DERSHOWITZ].

33. *Id.* at 494.

Preventive Confinement

tal hospitals are there on purely preventive grounds. As with juveniles, the grounds of the confinement are multifaceted: some are confined for custodial purposes—merely to prevent them starving or otherwise succumbing to the elements; others are confined for therapeutic purposes—to prevent them from becoming any sicker and to help them recover; still others are confined for purposes of isolation—to prevent them from engaging in predicted conduct that might be harmful to themselves or others.

Two other categories of pure preventive confinement that affect a small number of persons warrant brief mention. First, since the beginning of recorded history society has medically quarantined persons infected with contagious diseases. The leper colony is perhaps the oldest form of medical confinement, and leprosaria still exists in many parts of the world, including this country. Tuberculosis sanatoria also dot the American landscape, and a number of state statutes still permit confinement of persons afflicted with “active” or “contagious” tuberculosis.³⁴ The law also still mandates and sometimes enforces home quarantine—though less frequently than in earlier generations.³⁵ Although in some cases the statute requires that the diseased person intentionally must have acted in a way that created an unwarranted risk of exposure to others, this type of confinement is generally preventive in the pure sense.³⁶

The final category warranting inclusion in this illustrative catalogue is the confinement of material witnesses—a practice authorized at common law and under many American statutes. Under this practice a court may confine “one whose only connection with a [criminal] case is that he happens to know some material fact in relation thereto”³⁷ The court may confine a witness on the basis of a pre-

34. E.g., CAL. HEALTH & SAFETY CODE § 3285 (West 1970).

35. E.g., TEXAS SANITARY CODE, TEX. REV. CIV. STAT. ANN. art. 4477, §§ 7, 8 (1966).

36. The quarantine concept is currently being used metaphorically to justify the confinement of drug addicts who are thought to be spreading an epidemic of addiction. See generally Dershowitz, *Constitutional Dimensions of Civil Commitment*, in NATIONAL COMMISSION ON MARIJUANA & DRUG ABUSE, *DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE*, Appendix, vol. 4, at 397 (2d Report 1973). Drug addicts are not sick in the same sense as tuberculars, nor do they spread their disease in the same way. For another current use of the quarantine concept, see Schulder & Goodman, *The Public Health Law as Preventive Detention*, *The Village Voice*, Jan. 4, 1973, at 24 (discussing the quarantining of prostitutes allegedly to examine for possible venereal disease).

37. *Crosby v. Potts*, 8 Ga. App. 463, 468, 69 S.E. 582, 584 (1910). See also *Hurtado v. United States*, 93 S. Ct. 1157 (1973); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929).

diction that he will flee the jurisdiction rather than appear at trial. This prediction need not be based on any past act and is sometimes based solely on the witness' lack of "roots" in the community.³⁸

These are some examples of pure preventive confinement. They all share a significant preventive component, though some have other purposes as well; they all share an absence of any formal requirement of a prior voluntary or culpable act or of any suspicion that the past act in fact was committed. Other than these common points, however, the purely preventive mechanisms differ significantly in purpose, effect, duration, and justification.

B. *Actual Suspicion*

A more common form of preventive confinement occurs when it is suspected or assumed that an individual did commit past harmful or dangerous acts not susceptible to easy proof. The resulting confinement is preventive in the sense that it aims primarily to preclude repetition of the suspected conduct. The prediction or assumption that the offender will repeat the act if not confined, however, rests on the assumption that he actually committed the past act. The roots of this approach run deep in Anglo-American legal history. Blackstone characterized the peace bond, the preventive technique most frequently employed at common law, as "preventive justice."³⁹ This bond empowered the justices of the peace to require securities of those persons who may be "inclined to the Breach of the Peace."⁴⁰ Failure to provide securities resulted in confinement in a gaol. Though preventive in theory, the justices employed the bond largely against persons suspected of past crimes, either as a result of their reputation ("of evil Name and Fame") or their occupation (those "who live idly, and

38. See Dershowitz, *When in Doubt, Don't Let Them Out*, N.Y. Times, Apr. 25, 1971, § 4, at 8, col. 1.

Sometimes a court may order this confinement because it suspects that the witness was culpably involved in the crime. See, e.g., *United States ex rel. Ginton v. Denno*, 339 F.2d 872 (2d Cir. 1964), cert. denied, 381 U.S. 927 (1965). Confinement under these circumstances does not constitute pure preventive detention; confinement based solely on a prediction of flight, however, fits comfortably within that category.

39. 4 BLACKSTONE, *supra* note 6, at *251.

40. M. DALTON, *THE COUNTRY JUSTICE* 380 (1727). For a detailed discussion of the preventive jurisdiction of the justices of the peace, especially of their power to require peace bond sureties, see Dershowitz, *The Origin and Practice of Preventive Confinement in Anglo-American History* (Robert Marx Lectures at the University of Cincinnati 1973—to be published in the University of Cincinnati Law Review in 1974).

yet fare well, or are well apparelled, having nothing whereon to live").⁴¹

The law of vagrancy, especially as it is used in urban areas, has carried this approach directly into modern times. Like the ancient peace bond, its design permits its use both to prevent anticipated crime and to punish suspected but unproven past crimes. The Court of Appeals for the D.C. Circuit has described the basic design of the vagrancy law as "preventive conviction." "Vagrancy enforcement," said the court, is "a device utilized not only to inflict punishment for suspected but unprovable violations in progress but also, through preventive conviction and incarceration, to suppress crime in the future '[I]t puts people in jail who might be about to commit a crime or who might commit a crime in the near future'"⁴²

Since this type of preventive confinement authorizes imprisonment on suspicion of an unproven or unprovable past offense, it carries the inherent possibility of abuse. *Hamrick v. State*,⁴³ a recent sex psychopath case, well illustrates this possibility. A grand jury indicted John Hamrick on two charges of rape against different women. Hamrick claimed that the prosecuting witnesses consented. At his trial on the first charge a jury unanimously acquitted him. On the day set for trial of the second charge, the district attorney called off the prosecution and petitioned the court to commit Hamrick as a "criminal sexual psychopath." In support of his petition the district attorney submitted only "a transcript of the testimony of the complaining witnesses in each of the preliminary hearings on the rape charges." The Alabama Supreme Court found this evidence sufficient to support Hamrick's commitment and went on to say that even if "appellant was not guilty of rape because each of the prosecuting witnesses consented to the sexual intercourse, there is still enough evidence of indignities and acts of perversion by appellant to justify the charge that he is a criminal sexual psychopathic person."⁴⁴ By invoking the label of "prevention," the state succeeded in circumventing the requirement that it prove a specific crime to a jury beyond a reasonable doubt. Under the preventive statute the judge had only to "ascertain" that Hamrick was a sex psychopath.⁴⁵ Furthermore, the

41. M. DALTON, *supra* note 40, at 411.

42. *Ricks v. District of Columbia*, 414 F.2d 1097, 1109 (D.C. Cir. 1968).

43. 281 Ala. 150, 199 So. 2d 849, *appeal dismissed*, 389 U.S. 10 (1967).

44. *Id.* at 152, 199 So. 2d at 850.

45. ALA. CODE tit. 15, § 438 (1958).

judge could reach this conclusion on the basis of psychiatric testimony, which itself assumed unproven, noncriminal acts. The Supreme Court dismissed Hamrick's appeal.⁴⁶

This potential for abuse is not limited to the preventive detention of sexual psychopaths, as *Dodd v. Hughes*,⁴⁷ a Nevada Supreme Court decision, illustrates. A Nevada district court had adjudged Monte Dean Dodd a "mentally ill person" and committed him to the Nevada State Hospital. Dodd sought release, and at his habeas corpus hearing the hospital's superintendent testified that Dodd was not mentally ill within the meaning of the state commitment law because he was not psychotic. A second psychiatrist disagreed with the superintendent's definition of mental illness, asserting that, while Dodd was indeed not psychotic, he was a "sociopathic personality" and for that reason was statutorily mentally ill. The trial judge resolved the psychiatrists' dispute over the statutory meaning of mental illness by ordering Dodd committed indefinitely, but to the state prison rather than to a mental hospital.

The state supreme court affirmed Dodd's commitment. It concurred in the trial court's judgment that the legislature used the term "mental illness" to signify a broader category of disturbed individuals than the psychiatric definition of psychosis encompassed and found sufficient evidence in the record to support the trial court's decision that Dodd was a menace to the public safety. As is often the case, however, the appellate opinion failed to examine the real basis of confinement. In fact, at trial it was assumed that Dodd had committed a serious assault three years before the hearing. It was believed that Dodd had attacked an old farmer with a crowbar, saturated him with gasoline, and set him ablaze.⁴⁸ On the basis of this assumption the psychiatrists had predicted Dodd's dangerous propensities, differing only in the confidence with which they asserted that he would engage in harmful conduct and the quality of the harmful conduct that they believed he would manifest.⁴⁹ On the same basis the trial judge

46. *Hamrick v. Alabama*, 389 U.S. 10 (1967).

47. 81 Nev. 43, 398 P.2d 540 (1965).

48. Dodd's counsel initially admitted this. Record at 2, *Dodd v. Hughes*, 81 Nev. 43, 398 P.2d 540 (1965). The trial judge stated: "[W]e have to assume, don't we, that he did make the attack on the old man, hit him on the head with a crowbar, saturated him with gasoline"—to which Dodd's counsel did not object. Record at 19.

49. Dr. Hughes, Superintendent of the Nevada State Hospital, testified that Dodd, while relatively dangerous, was perhaps more dangerous to property than to people, and was "certainly [not] a boy that is waiting to commit murder at the first opportunity, because he has had many opportunities." Record at 18-19. Dr. Coopersmith,

concluded that Dodd was “a homicidal maniac,” “an animal in human clothing,” and a person who “was just born without a lot of necessary wiring,”⁵⁰ and ordered him incarcerated to protect society.

Although the record contained some evidence that Dodd had committed the crime in question⁵¹—one psychiatrist testified that Dodd had admitted the act—his guilt had nonetheless never been proven.⁵² In order to ensure confinement for life, the state had apparently elected to commit Dodd to the mental hospital rather than convict him of the crime. As the trial judge explained: “You see we can’t prosecute this fellow. The antiquated, archaic criminal law doesn’t take care of his case.”⁵³ The hospital superintendent was equally candid: “There was a choice about prosecuting it when this thing happened, and Judge Wines told me he figured if he went to the state penitentiary he would be out in a year or two. And if he went to the state hospital he would be in forever.”⁵⁴ The *Dodd* case thus provides a paradigm of preventive confinement formally requiring no prior act, but based on suspected criminal conduct that for one reason or another cannot be proved or cannot be punished severely enough to satisfy all the state’s goals.

The McCarran Detention Act,⁵⁵ which was on the statute books for about twenty years, provides yet another example of a confinement mechanism that purported to be preventive, but that was in reality based in large part on suspicion of past illegal acts that would have

on the other hand, testified that Dodd had “a higher potential for homicidal activities than the average person” and should not be turned loose in society without a great deal of supervision. Record at 13-14. (Having “a higher potential for homicidal activities than the average person” may still mean that he has considerably less than a 1 in 1000 chance of engaging in such activities.)

50. Record at 24.

51. Record at 19. Dodd, however, was never called to testify and in fact was not present at the hearing. Record at 1.

52. Record at 19. Nor was Dodd’s relationship to the other two boys who had allegedly been involved in the assault ever clearly established. Record at 18-19.

53. Record at 27. The record did not clearly reflect why the state could no longer prosecute Dodd for the alleged offense. Dr. Hughes’ testimony suggests, however, that the state may have allowed the juvenile court to process him after the offense occurred:

When he was committed in the first place, he was handled as a juvenile, and they picked their course and they took him and were going to do the best they could for him.

. . . . Well, it turned out he wasn’t curable. So then he came back and the question was: What will we do next? They had already given up the chance to take him through as an adult. So then they said, “Well, we’ll commit him as a mentally ill person.”

Record at 28.

54. Record at 27-28.

55. Emergency Detention Act of 1950, ch. 1024, §§ 1-116, 64 Stat. 1019 (repealed 1971).

been difficult to prove at a criminal trial. The statute authorized the preventive confinement—during periods of internal security emergency—of persons who there was “reasonable ground to believe . . . probably will commit or conspire with others to commit espionage or sabotage”⁵⁶ The statute catalogued “evidentiary matters” that should be considered in making this decision. Not surprisingly, the matters consisted primarily of suspected past actions, such as (1) whether “such person has knowledge of or has received or given instruction or assignment in the espionage, counterespionage, or sabotage service”; (2) “any past . . . acts of espionage or sabotage”; or (3) “activity in the espionage or sabotage operations of, or the holding at any time after January 1, 1949, of membership in, the Communist Party of the United States. . . .”⁵⁷ Acts within the first category would, of course, constitute serious crimes if they could be proved. The McCarran Act thus employed “preventive” detention in this category of cases to dispense with the rigorous requirements of proving past criminality. Acts in the second category would also be crimes, unless they had already been punished or the statute of limitations had run. “Preventive detention” was thus being employed to circumvent the double jeopardy and ex post facto prohibitions of the Constitution. Acts in the third category, if not covered by the first two, would consist of membership in an organization that a statute of doubtful constitutionality had made criminal. The Act thus used preventive detention to avoid a possible judicial decision that membership could not be criminalized.

The McCarran Detention Act differed—in fundamental respects—from the preventive action taken against the Japanese-Americans. The former attempted primarily to confine individuals whose past suspected acts of espionage, sabotage, or membership in hostile organizations made them dangerous; the latter attempted to confine an entire group without regard to individual past acts. Inclusion in the former category required a voluntary act; inclusion in the latter required merely an involuntary and unchangeable “birth status.”

Emergency preventive detention during times of war or internal security danger—or administrative detention, as it is sometimes called—is almost always a mechanism for confining “dangerous” persons who are suspected of activities that cannot be proved at a criminal trial.⁵⁸

56. *Id.* § 109(h).

57. *Id.* § 109(h)(1)-(h)(3).

58. Administrative detention in Israel, for example, serves precisely that purpose.

Preventive Confinement

For example, the Irish, Canadian, and Israeli laws, as well as other preventive measures, use this method to confine suspects. Some such measures require a finding based on past acts, which need not satisfy the usual criminal standards; others require, in form at least, a mere prediction or determination of dangerousness without mentioning past acts,⁵⁹ though suspected past acts will often form the realistic basis for the confinement.

The pretrial preventive detention statute that Congress recently enacted—and the long standing practices that it legitimated—is another example of preventive confinement formally requiring no conviction for a past crime, but resting heavily on the assumption that a past crime was committed. The principle problem addressed by this device is not lack of evidence, but lack of time. Many detainees are actually guilty of the crimes for which they stand charged, or so the judges and prosecutors certainly believe. Nonetheless, there will be an inevitable hiatus between the time of arrest and the time when the past crime can be proved. To prevent further crime, the act authorizes the judge to confine those defendants he believes may be especially dangerous, if otherwise they would be permitted to remain at liberty during the hiatus. That decision, however, is supposed to rest in large part on the strength of the evidence that he committed past crimes, including the one for which he stands charged.⁶⁰

C. Duration of Confinement

At the point of the preventive continuum closest to the conventional criminal law lie the confinement mechanisms that require either proof or conviction of a specific criminal act as a trigger for confinement, the duration of which depends on the actor's predicted danger-

For a thorough discussion of one case that puts the problem there in sharp focus, as well as a discussion of the alternatives, see Dershowitz, *Terrorism and Preventive Detention: The Case of Israel*, COMMENTARY, Dec. 1970, at 67. See also Dershowitz, *Stretch Points of Liberty: Would the Constitution Be Suspended During Times of Crisis*, 212 THE NATION 329 (1971).

59. Nevertheless, most administratively detained individuals are suspected of some past illegal act. The mechanism has another possibility of abuse, however; using it, authorities may confine individuals solely to silence protected, but dangerous, speech. See Dershowitz, *Terrorism and Preventive Detention*, *supra* note 58.

60. D.C. CODE ANN. § 23-1322 (Supp. V 1972). For former Attorney General Mitchell's defense of this statute see *Hearings on Anti-Crime Proposals Before Subcomm. No. 3 of the House Comm. on the District of Columbia*, 91st Cong., 2d Sess. 11 (Supp. 1970); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969). For a criticism of the statute see Dershowitz, *Imprisonment By Judicial Hunch*, 57 A.B.A.J. 560 (1971).

ousness rather than on the past act alone. The debate between Chief Justice Burger and Chief Judge Bazelon in the *Cross* case focused on this mechanism. In that case past acts of exhibitionism had triggered the appellant's confinement.⁶¹ Chief Judge Bazelon pointed out that indecent exposure normally carried a maximum sentence of ninety days, while the statute in question would subject the appellant to confinement for the rest of his life.

These kinds of preventive statutes are prevalent throughout the United States. The Maryland defective delinquency statute, which has been the subject of much recent litigation,⁶² is but one example. It provides for indefinite confinement of up to life for allegedly dangerous defendants convicted of even minor offenses. Statutes that provide for automatic and indeterminate commitment of persons acquitted by reason of insanity without regard to the crime of which they were "acquitted" are another. Additionally, many sentencing and parole decisions belong in this category. In these situations the legislature and presumably the Constitution has authorized a broad range of permissible sentences in response to a past crime. The decision concerning the appropriate duration of confinement within that range is often made largely on the basis of a prediction concerning the likelihood that the convicted criminal will recidivate. It may, of course, be argued that these decisions involve no element of preventive confinement, since the statute authorizes the maximum sentence and the decision to impose less is not really a decision to confine on a prediction of dangerousness, but a decision to release on a prediction of nondangerousness. Yet under any characterization the length of the convicted criminal's confinement turns at least in part on a prediction of his propensity to commit future crimes.

Indeterminate sentencing laws have carried this approach to its logical extreme. These laws use the commission of criminal acts of a certain degree of severity or frequency to trigger an indeterminate sentence of up to life, and leave the decision when, and whether, to release to the discretion of some administrative board.⁶³

61. *Cross* had pleaded guilty to one count of exhibitionism. Chief Justice (then Judge) Burger argued that "Appellant's record stipulation that he recently engaged in various acts of indecent exposure supplies the basis for commitment . . ." 418 F.2d at 1109.

62. MD. ANN. CODE art. 31B, §§ 1-19 (Supp. 1972); see, e.g., *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippet v. Maryland*, 436 F.2d 1153 (4th Cir.), *cert. granted*, 404 U.S. 999 (1971), *cert. dismissed as improvidently granted*, 407 U.S. 355 (1972).

63. See FRANKEL, *supra* note 22.

These examples define some points along the preventive confinement continuum. There are obvious differences of policy and constitutionality between the decision to confine a racial group on the basis of vague predictions tied to no past acts and the decision to sentence a convicted exhibitionist to life because of a prediction based on his past conduct. Yet there are similarities as well, and when courts confront the issues of preventive confinement, they should be sensitive to both the differences and the similarities. Moreover, they should abjure reliance on labels such as "preventive detention" as a substitute for careful analysis. And courts will confront these difficult issues in the coming years. In his recent opinion in *Jackson v. Indiana*,⁶⁴ Justice Blackmun discussed the "bases" for various confinement mechanisms, such as civil commitment, defective delinquency laws, sexual psychopath laws, and commitment of persons acquitted by reason of insanity. "Considering the number of persons affected," he observed, "it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."⁶⁵ Organizations interested in challenging these laws have not ignored this unambiguous invitation to litigate.

Several courts recently have considered constitutional challenges to various forms of preventive confinement, but few substantive limitations have emerged. Courts have taken a number of approaches that have permitted them to avoid the substantive constitutional issues. Not surprisingly, most have focused on procedural safeguards or their absence in predictive determinations. As Justice Harlan said in his separate opinion in the *Gault* case, while courts "must give the widest deference to legislative judgments" concerning the substantive criteria for confinement, "courts have been understood to possess particular competence" in assessing the "necessity and wisdom of procedural guarantees."⁶⁶ For generations, however, courts avoided even the responsibility of supervising the procedures associated with predictive determinations. This evasion took the form of a legal labeling game known as "civil v. criminal."

II. Legal Labels: Civil v. Criminal

The object of the civil-criminal labeling game is simple: the court must determine whether certain procedural safeguards, required

64. 406 U.S. 715 (1972).

65. *Id.* at 737.

66. *In re Gault*, 387 U.S. 1, 70 (Harlan, J., concurring).

by the Constitution in "all criminal prosecutions," apply to various proceedings. The rules are a bit more complex. The legislature enacts a statute that restricts the liberty of one player—variously called the defendant, patient, juvenile ward, deportee, et cetera. That player must then convince the court that the formal proceeding through which the state restricts his liberty is really a criminal prosecution. The state, on the other hand, must show that the proceeding is really civil; for support it often claims that the results of the proceeding help, rather than hurt, its opponent.

In the course of this game's long history, prosecutors have succeeded with the help of the court, and all too often, without the opposition of "defense" attorneys, in attaching the civil label to a wide range of proceedings including commitment of juveniles, sex psychopaths, the mentally ill, alcoholics, drug addicts, and security risks. Likewise, sterilization, deportation, and revocation of parole and probation proceedings are regarded as civil. By attaching this label, the state has successfully denied defendants almost every important safeguard required in criminal trials. Invocation of this talismanic word has erased a veritable bill of rights. As Alice said, "That's a great deal to make one word [do]." To which Humpty Dumpty responded: "When I make a word do a lot of work like that . . . I always pay it extra."⁶⁷ Until quite recently, this word must have been well paid indeed, for it was doing the work of an army of jurists.

A. "Civil"

As with most traditional games, a number of favorite gambits have developed over the years. Some courts, for example, give no reason at all for concluding that a proceeding is civil. They simply assert, often in italics, that it is *clearly*, *demonstrably*, or *manifestly* civil. Others have attributed conclusive significance to the chapter of the code in which the proceeding appears. Thus, one state supreme court said that a sex psychopath proceeding was obviously not criminal because it was not located "in either the Code of Criminal Procedure or the Penal Code."⁶⁸ Location in the statute books, however, is not always dispositive. The United States Supreme Court held that a California statute that made narcotics addiction a misdemeanor was crim-

67. L. CARROLL, *THROUGH THE LOOKING-GLASS* 95 (1965).

68. *People v. Chapman*, 301 Mich. 584, 602, 4 N.W.2d 18, 26 (1942).

Preventive Confinement

mal though contained in the "Health and Safety Code."⁶⁹ The California Supreme Court then held an addict commitment law civil though it appeared in the penal code.⁷⁰

In accord with Supreme Court dicta that evidence of a legislative intent to regulate rather than punish might justify the absence of criminal safeguards,⁷¹ courts sometimes look to the declared legislative purpose to decide whether a proceeding is civil or criminal. Thus, one state supreme court attributed significance to a statutory declaration that "the Director of the Department of Corrections shall engage in a program of research in the detention, treatment and rehabilitation of narcotic addicts."⁷² That court omitted to mention that similar hortatory statements decorate the pages of many penal codes.⁷³ Some courts have gone as far as attributing significance to the title borne by the judicial document that commences the proceeding. As the California Supreme Court once observed: "The certificate [filed in this addict commitment case] is entitled 'The People of the State of California

69. *Robinson v. California*, 370 U.S. 660 (1962).

70. *In re De La O*, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, cert. denied, 374 U.S. 856 (1963).

71. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 & n.43 (1963).

72. *In re De La O*, 59 Cal. 2d 128, 146-47, 378 P.2d 793, 805, 28 Cal. Rptr. 489, 501 (1963). The California court relied on this and five other provisions of the statute, Cal. Penal Code § 6405, ch. 850, [1961] Cal. Stat. 2224 (now CAL. WELF. & INST'NS CODE § 3005 (West 1972)), in upholding its constitutionality.

73. *E.g.*, CONN. GEN. STAT. ANN. § 18-81 (Supp. 1973) ("The commissioner of correction shall . . . be responsible for establishing disciplinary, diagnostic, classification, treatment, vocational and academic education, research and statistics, training and development services . . ."); ILL. ANN. STAT. ch. 38, § 1003-2-2(d) (Smith-Hurd 1973) ("the Department shall have the . . . [powers] . . . [t]o develop and maintain programs of control, rehabilitation and employment of committed persons within its institutions."); MINN. STAT. ANN. § 241.27(1) (1972) (The commissioner of correction is empowered to provide "more adequate, regular and suitable employment for the vocational training and rehabilitation of inmates . . ."). In particular, Massachusetts law provides that the commissioner of correction shall "establish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department" MASS. GEN. LAWS ANN. ch. 124, § 1(e) (Supp. 1972). Moreover, prisoners are to be classified "to promote their reformation," *id.* ch. 127, § 21 (1958), and are to be treated "with the kindness which their obedience, industry and good conduct merit." *Id.* § 32. Perhaps in Massachusetts even criminal prosecutions are civil.

If declarations of purpose were truly dispositive, even the death penalty might be regulatory, as Holmes's famous letter, which could easily become a declaration of legislative policy, shows:

If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country . . .

Letter from Oliver W. Holmes to Harold J. Laski, Dec. 17, 1925, in 1 HOLMES-LASKI LETTERS 806 (M. Howe ed. 1953).

For the Best Interest and Protection of Society and [the person to be committed]' rather than 'The People v. the accused.'"⁷⁴

Another technique for establishing that a proceeding is civil is to compare it with some other proceeding that is "clearly" civil. For example, one court recently held a sex psychopath law civil because "it resemble[d]" a commitment proceeding, which is certainly civil.⁷⁵ Another court held a commitment proceeding to be civil because it had much in common with a sex psychopath law, which courts have repeatedly "held . . . to be civil."⁷⁶ There is hardly a proceeding that has not been deemed civil because of its similarity to another proceeding that had in turn been deemed civil because of its similarity to the proceeding at issue.

Another approach that courts sometimes use to justify their conclusion that a particular proceeding is civil suffers from as much circularity as these comparisons, but is far more dangerous. Courts sometimes reason that whether a proceeding is criminal or civil depends on

74. *In re De La O*, 59 Cal. 2d 128, 140, 378 P.2d 793, 805, 28 Cal. Rptr. 489, 501 (1963) (emphasis in original). The California Supreme Court, however, has since abandoned this ground. See, e.g., *People v. Victor*, 62 Cal. 2d 280, 284, 398 P.2d 391, 395, 42 Cal. Rptr. 199, 203 (1965).

To preserve this fictional role, some prosecutors even object to the use of words "prosecutor" and "accused" at trial. In a recent commitment proceeding, concerning a sociopath who had been charged with carrying a concealed weapon, the patient's attorney inadvertently referred to the government attorney as the prosecutor. The government attorney rose, in righteous indignation, to "object to that classification. I am not a prosecutor in this case and this person is not an accused." His objection, made in the best prosecutorial style, was of course sustained. Unreported hearing before the District of Columbia District Court, excerpted in KATZ, GOLDSTEIN & DERSHOWITZ, *supra* note 32, at 603-10.

75. *People v. Chapman*, 301 Mich. 584, 603, 4 N.W.2d 18, 26 (1942), interpreting Criminal Sexual Psychopathic Persons Act, No. 165, [1939] Mich. Pub. Acts 323 (repealed 1968). A number of other states utilize similar logic in constraining their sexual psychopath statutes. See, e.g., *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874 (Iowa 1969) (procedure and purpose of the law are civil, similar to those in mental illness determinations); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897 (1950) (act resembles statutes providing for civil inquiry into sanity); *In re Craft*, 99 N.H. 287, 109 A.2d 853 (1954) (statutory procedure analogous to insanity proceeding). *Contra*, *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1965), enforcing *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1965) (harmonization of sexual psychopath law with civil commitment of mentally ill is impossible); *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P.2d 159 (1951) (commitment of sexual psychopath not equivalent to pronouncement of insanity, and no analogies should be drawn between sexual psychopath and insanity statutes).

76. *Miller v. Overholser*, 206 F.2d 415, 418 (D.C. Cir. 1953).

It should be noted that a third possible permutation of this technique exists: declaring a new sexual psychopath statute civil by comparison with such a statute of another jurisdiction that has previously designated it civil. Nebraska has employed this device. See *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583 (1965).

the procedural safeguards that accompany it. If it has the safeguards usually associated with a criminal proceeding, then it is criminal; if it lacks those safeguards, then it must be civil. Thus, in determining that a statute could "only be viewed as civil in nature, purpose and effect," one court looked to the commitment procedures at issue to find they did "not involve trial by jury as in criminal cases."⁷⁷ The dangers of this approach are patent: it may actually encourage a state to eliminate important safeguards in order to assure that courts will regard the proceeding as civil. An episode from the history of Michigan's sex psychopath law demonstrates this danger.

In 1937, the Michigan legislature enacted a relatively narrow sex psychopath law that applied only to persons convicted of, or serving sentences for, specified sex offenses. The law required a jury trial and other procedural safeguards.⁷⁸ In 1938, a man who had been convicted of one of these specified sex offenses challenged the statute.⁷⁹ After he had served three months of his five-year sentence, a jury found that he was committable under the sex psychopath law. He challenged the constitutionality of the law, alleging that the proceeding, though criminal in nature, failed to provide all the safeguards required in criminal proceedings. The attorney general contended that it was "a civil proceeding and analogous to statutory inquests relative to insane prisoners, which [are] civil in nature."⁸⁰ The court agreed with the petitioner. Although it conceded that an insanity inquest constituted a civil proceeding, it rejected the attorney general's analogy. An insane person, the court reasoned, may be committed without proof of any criminal act, whereas "under this act defendant is under sentence for an overt sex deviation offense."⁸¹ Furthermore, the court said, "we must class [the law] where we find it placed by its authors, and we find it in the . . . criminal code . . ."⁸² It concluded that as a criminal statute it was unconstitutional because it subjected "an accused to two trials and convictions in different courts for a single statutory crime."⁸³ Thus, in declaring the law unconstitutional, the court focused on two of the act's most important safeguards—the re-

77. *In re De La O*, 59 Cal. 2d 128, 145-46, 378 P.2d 793, 804, 28 Cal. Rptr. 489, 500 (1963).

78. No. 196, ch. IX, §§ 1-a, -b, [1937] Mich. Pub. Acts 306 (repealed 1939).

79. *People v. Frontczak*, 286 Mich. 51, 281 N.W. 534 (1938).

80. *Id.* at 59, 281 N.W. at 536.

81. *Id.* at 59, 281 N.W. at 537.

82. *Id.* at 58-59, 281 N.W. at 536.

83. *Id.* at 58, 281 N.W. at 536.

quirement of a specified sex offense conviction and the availability of jury trials on the issues of conviction and committability. The message to the legislature was clear: a constitutional sex psychopath law must eliminate the requirement of a conviction, do away with the right of two jury trials, and be published in the proper section of the code.

The following year the Michigan legislature did precisely that. It enacted a new law, which covered persons "charged with" any "criminal offense," and placed it in a different part of the code. It permitted only one jury trial, on the issue of committability, which the defendant had to request affirmatively. The legislature made numerous other changes as well, most of which made commitment easier and release more difficult.⁸⁴ A man who had been charged with "an act of gross indecency" soon challenged his commitment under the new statute.⁸⁵ This time, however, the court was

satisfied that the present statute . . . contains none of the constitutional infirmities of the previous statute The present statute is not contained in either the Code of Criminal Procedure or the Penal Code. It makes sex deviators subject to restraint because of their acts and condition, and not because of conviction and sentence for a criminal offense. The procedure under this statute resembles a statutory inquest for the commitment of an insane person⁸⁶

Accordingly, the court held that the statute was civil and that the constitutional safeguards claimed by petitioner—protection against cruel and unusual punishment, self-incrimination, and ex post facto laws—did not apply.⁸⁷ The defendant based his arguments, the court said, "on the erroneous assumption that the statute is a criminal statute and that the period of confinement is punitive."⁸⁸ Satisfied by its own well rounded arguments, the court affirmed the order of commitment.

The state had learned well the lesson of the first decision: the best way to assure that courts will uphold a criminal statute against a charge that it fails to provide *every* safeguard is to eliminate enough of

84. No. 165, [1939] Mich. Pub. Acts 323 (repealed 1968). The repealing statute, MICH. COMP. LAWS ANN. § 330.35b (Supp. 1973), allows parole of any person committed under the old act.

85. *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942).

86. *Id.* at 602, 4 N.W.2d at 26.

87. *Id.* at 601, 604, 608, 4 N.W.2d at 25, 27, 28. The court also held that the new statute satisfied federal due process and equal protection requirements. *Id.* at 599, 603, 4 N.W.2d at 25, 26.

88. *Id.* at 600, 4 N.W.2d at 25.

Preventive Confinement

the existing safeguards so that the statute will be deemed civil and thus "not circumscribed by the constitutional and statutory limitations surrounding a person accused of . . . a crime."⁸⁹ This labeling game left Michigan with a "constitutional" statute that provided far fewer safeguards and far harsher consequences than its previous "unconstitutional" statute.

B. *Nonadversary*

Since even civil proceedings require certain fundamental safeguards that some prosecutors prefer to circumvent, a variation of the first labeling game has been devised. Judges have sometimes said that certain proceedings were neither criminal nor civil. Mr. Justice Stewart recently expressed this view about juvenile delinquency proceedings. "[They] are not criminal trials," he said. "They are not civil trials. They are simply not adversary proceedings."⁹⁰ The possible implications of this position become clearer against the background of the dissenting opinion in *Miranda v. Arizona*,⁹¹ which Justice Stewart joined. The dissenters first wondered about the therapeutic effects of confession, arguing that confession may benefit the accused by providing psychological relief and enhancing his prospects for rehabilitation. That confession may also result in imprisonment seemed not to diminish its potential beneficial effect, for the dissenters then asked:

Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare⁹²

Now, if imprisonment is really sometimes the "best thing," then perhaps even a criminal trial culminating in imprisonment should not always be regarded as an adversary proceeding. Chief Justice (then

89. *Id.* at 603, 4 N.W.2d at 26.

90. *In re Gault*, 387 U.S. 1, 78 (1967) (Stewart, J., dissenting); see also *In re Mundy*, 97 N.H. 239, 244, 85 A.2d 371, 375 (1952) ("[T]he nature of the proceeding is not criminal nor really even an adversary civil proceeding in the ordinary sense."); *In re Moulton*, 96 N.H. 370, 373, 77 A.2d 26, 28 (1950) (The purpose of the New Hampshire Sexual Psychopath Law, ch. 314, [1949] N.H. Laws 422 now N.H. REV. STAT. ANN. § 173-A (1972), was to protect society and to "benefit the person involved.").

91. 384 U.S. 436, 526 (1966) (White, J., with Harlan & Stewart, JJ., dissenting).

92. *Id.* at 543.

Judge) Burger came close to this position in considering a parole revocation proceeding that culminated in incarceration. He noted that "[t]he Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made." From that he concluded that parole revocation is not an "adversary proceeding in the usual sense" because there is a "genuine identity of interest if not purpose" between the parolee and the Board. "Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*."⁹³

C. *The Decline of the Civil Label*

Courts have begun in recent years to resist "the feeble enticement of the 'civil' label-of-convenience,"⁹⁴ and to question the "murky" meaning and "dubious" credentials of the "*parens patriae*" notion.⁹⁵ In *Gault* the Supreme Court held various provisions of the Bill of Rights applicable to certain juvenile delinquency proceedings. "[C]ommitment," the Court said, "is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'"⁹⁶ The Court also rejected the state's argument that juvenile proceedings "were not adversary [since] the state was proceeding as *parens patriae*."⁹⁷ It recognized that under this Latin banner "the powers of the Star Chamber [had become but] a trifle in comparison with those of our juvenile courts"⁹⁸ It concluded that the condition of being a boy does not justify a kangaroo court.

The Court invoked similar rhetoric in deciding that commitment

93. *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). Judge Burger did not elaborate on the "identity of interest" between the parole officer who is seeking to return the parolee to prison, and the parolee who is seeking to remain free and denying violation. But presumably that "identity of interest" is the greater good of the parolee, which can only be attained by denying him the privilege he has abused. "In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege." *Id.* at 237. "The procedures for terminating parole are simply an acknowledgment that in granting parole some errors will be made and the errant parolee must be retaken for his own good as well as that of society." *Id.* at 242.

94. *In re Gault*, 387 U.S. 1, 50 (1967).

95. *Id.* at 16.

96. *Id.* at 50.

97. *Id.* at 16.

98. *Id.* at 18, quoting Pound, *Foreward* to P. YOUNG, *SOCIAL TREATMENT IN PROBATION AND DELINQUENCY* (1937).

proceedings under the Colorado Sex Offender Act,⁹⁹ whether denominated civil or criminal are subject to both the equal protection and due process clause.¹⁰⁰ The Court held that when violation of one criminal statute is made the basis for commencing another proceeding, the incarceration under the second proceeding "is criminal punishment even though it is designed not so much as retribution as to keep individuals from inflicting future harm."¹⁰¹

III. Emerging Legal Labels: Predictive v. Retrospective

As the civil label of convenience thus began its decline into judicial disrepute, a similar labeling game began its ascent. This game distinguishes between proceedings that determine whether specific past acts occurred and proceedings that predict future behavior. No less a liberal than Judge David Bazelon has suggested that predictive judgments require fewer safeguards than determinations of past acts.¹⁰² The Supreme Court, too, authoritatively articulated this position in *Williams v. New York*.¹⁰³ It contrasted the determination of guilt with the judge's predictive decision about the type and extent of punishment. The determination of past conduct, said the Court, requires evidentiary rules that "narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged" whereas the predictive decision requires "the fullest information possible concerning the defendant's life and characteristics."¹⁰⁴ Thus "open court testimony with cross-examination" would be "totally impractical, if not impossible."¹⁰⁵ The Court concluded, therefore, that due process permitted a sentencing judge to impose the death penalty instead of the jury's recommended prison sentence because of information obtained ex parte through closed sources, like the probation department.

The Court also suggested this distinction in two later decisions that rejected the civil-criminal dichotomy. In *Gault* the Court carefully limited its holding to "proceedings by which a determination is made as

99. Act of April 1, 1953, ch. 89, 1953 Sess. Laws of Colo., 1st Reg. Sess. 249-52, as amended Act of April 23, 1957, ch. 122, 1957 Sess. Laws of Colo., 1st Reg. Sess. 329-32, Act of Feb. 11, 1963, ch. 96, 1963 Sess. Laws of Colo., 1st Reg. Sess. 282 (repealed 1968).

100. *Specht v. Patterson*, 386 U.S. 605, 608 (1967).

101. *Id.* at 608-9.

102. *Hyser v. Reed*, 318 F.2d 225, 252 (D.C. Cir.) (alternative holding), *cert. denied*, 375 U.S. 957 (1963); see *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964). But see *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

103. 337 U.S. 241 (1949).

104. *Id.* at 247.

105. *Id.* at 250.

to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part"¹⁰⁶ It reiterated this limitation throughout its opinion and has reaffirmed it in subsequent opinions.¹⁰⁷ In *Specht v. Patterson*¹⁰⁸ the Court explicitly distinguished the Colorado Sex Offender Act from the statute that it had upheld years earlier in *Minnesota ex rel. Pearson v. Probate Court*,¹⁰⁹ which it thought "was not criminal in nature, and was not triggered by a criminal conviction."¹¹⁰ Other than in their procedural safeguards, the two statutes differed significantly only in that the Minnesota statute could apply to a person who was not convicted of, or even charged with, a crime, while the Colorado statute required a criminal conviction. Reminiscent of the Michigan experience, this line of reasoning suggests that certain procedural safeguards are required only in proceedings where a specific past act must be proved. If the legislature chooses to commit defendants on the basis of predictive determinations that require no proof of a specific act, then it need provide fewer procedural safeguards.

Only Justice Harlan explicitly recognized the dangers of this newest labeling game. In his separate *Gault* opinion he argued that the Court had done both too much and too little. It had required too many safeguards in proceedings to punish past delinquency and too few in proceedings to prevent predicted harm. He reminded the Court that between 26 and 48 percent of the children brought before juvenile courts are not charged with past crimes and cautioned that "it would be imprudent, at the least, to build upon these classifications rigid systems of procedural requirements which would be applicable, or not, in accordance with the descriptive label given to the particular proceeding." A better approach, he suggested, would require the essential elements of fundamental fairness in juvenile courts, however the state labeled the proceeding. This approach would avoid both unnecessarily rigid restrictions and dependence on illusory classifications.¹¹¹

106. 387 U.S. at 13.

107. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 534 (1971). Justice Blackmun there characterized six Supreme Court decisions concerning juvenile delinquency as requiring certain constitutional safeguards during "that part of the state juvenile proceeding that is adjudicative in nature." Justice Blackmun apparently meant adjudicative of past acts. See also *In re Winship*, 397 U.S. 358, 359, 368 (1970) ("[P]roof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.").

108. 386 U.S. 605 (1967).

109. 309 U.S. 270 (1940).

110. 386 U.S. at 610 n.3.

111. 387 U.S. at 77.

Preventive Confinement

Even Justice Harlan, however, ultimately seemed to assume that noncriminal predictive judgments require fewer safeguards than determinations of past criminal acts. In explaining his preference for "fundamental fairness" regardless of label, he offered this familiar observation:

Efforts are now being made to develop effective, and entirely noncriminal, methods of treatment for these children. In such cases, the state authorities are in the most literal sense acting *in loco parentis*; they are, by any standard, concerned with the child's protection, and not with his punishment. I do not question that the methods employed in such cases must be consistent with the constitutional obligation to act in accordance with due process, but certainly the Fourteenth Amendment does not demand that they be constricted by the procedural guarantees devised for ordinary criminal prosecutions.¹¹²

Thus Justice Harlan's own set of labels eventually captivated him. Aware of their often "arbitrary" and "ambiguous" nature, he was unwilling to see them frozen into constitutional rules. But in the final analysis he too subscribed to the view that predictive judgments require fewer safeguards than ordinary criminal prosecutions.

Despite the courts' assumptions, there is nothing about the nature of predictive judgments that supports the view that they require fewer safeguards than determinations of specific past acts. First, the consequences of predictive judgments do not—as a general matter—restrict freedom less than the consequences of historical determinations. The time spent behind walls because of a predictive judgment may often exceed the period of confinement resulting from a conviction. Nor do the conditions of confinement in a hospital differ significantly from those in a prison. Even when they do differ significantly, conditions in the hospital may sometimes restrict freedom even more than those in the prison.¹¹³ Moreover, the probability of error in predictive judgments may well exceed the probability of an erroneous conviction, and the reasons for this difference cut in favor of even greater formality and control in the process of predicting the future than in the process of determining the past. Participants in judicial decisionmaking have some

112. *Id.* at 76-77.

113. In two recent cases, for example, inmates of mental hospitals, one federal and one state, petitioned for transfer to ordinary prisons, where they thought the regime would be less punitive and more pleasant. *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); *United States ex rel. Shuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969).

sense of what it means to decide whether a specifically charged act was committed. Even without formal rules of evidence, the participants would bring to the decisionmaking process some framework for sorting out the relevant, believable, significant facts. This framework, though often rough and untested, is far more than the judge or jury is likely to bring to the process of predicting the future. While all judgments about human events, whether past or future, rest upon a superstructure of assumptions—a theory about how people behave—the experience of participants in the judicial process better equips them to construct and employ theories of the past than theories of the future. We are all historians, but few of us are scientists. Perhaps Lewis Carroll's Queen had a "memory" that worked equally well both ways: she remembered "things that happened the week after next" even better than things that happened yesterday. But Alice spoke for most of us when she said that her memory "only works one way I can't remember things before they happen."¹¹⁴

Some courts have suggested that while determinations of past acts are based on "facts," predictions are based on something other than facts. Therefore, they argue, those safeguards designed for factual determinations are not suited to predictions. If it is true, however, that judges predict on the basis of unverified hunches and implicit prejudices, then even greater reason exists to require those safeguards that force articulation of the grounds for decision. Predictive judgments, if they are to have any possibility of systematic accuracy, must be based on precisely the same sorts of historical facts on which past determinations are based.

Nor is it more important, as some courts and commentators have suggested, to exclude irrelevant or prejudicial information in arriving at past determinations than in making future ones. Numerous studies have demonstrated that a surplus of information distorts predictions at least as much as it does past determinations.¹¹⁵ A study, entitled "Does One Sometimes Know Too Much?,"¹¹⁶ supports this widely

114. L. CARROLL, *supra* note 67, at 73.

115. See Stelmachers & McHugh, *Contribution of Stereotyped and Individualized Information to Predictive Accuracy*, 28 J. CONSULT. PSYCHOL. 234 (1965) (prediction accuracy increases when predictors not allowed to use own discrimination to weigh variables); Walker & Bourne, *The Identification of Concepts as a Function of Amount of Relevant and Irrelevant Information*, 74 AM. J. PSYCHOL. 410 (1961).

116. Bartlett & Green, *Clinical Prediction: Does One Sometimes Know Too Much?*, 13 J. COUNSELING PSYCHOLOGY 267-70 (1966). In this study experimentors asked 6 experienced psychologists to predict the grade score performance of 40 students. They first gave the psychologists only the students' high school rank and

accepted conclusion. The study demonstrated that, though psychologists predicted significantly more accurately with fewer items of data available to them, they showed far more confidence in their predictions made with greater amount of data. The study concluded that the increased confidence was not only unjustified, but that it might be negatively related to the validity of the predictions. Therefore, as the experimenters observed, the study did not support "[t]he common notion that the clinicians"—or in this instance "judges"—"can be expected to exclude irrelevant information and utilize only the information that will maximize [their] predictions" ¹¹⁷ Thus the "requirement of rigid adherence to restrictive rules of evidence," which *Williams v. New York* deemed inappropriate to sentencing, seems essential in predictive as well as postdictive determinations.

Although identical safeguards need not apply to all predictive determinations in precisely the same manner as they apply to past determinations, the need for restrictive rules and procedural safeguards, appropriately designed for each particular type of proceeding, does not differ significantly. This approach can be illustrated by reference to several types of predictive proceedings and specific safeguards.

A. Judicial Predictive Determinations

1. *Predictions in Sentencing.*—It has been widely assumed that the aims of sentencing—particularly the preventive and rehabilitative aims—are best served by vesting the trial judge with untrammelled discretion to consider whatever factors he deems appropriate. This unverified assumption, which lies at the core of the Supreme Court's reasoning in the *Williams* case, was reiterated a few years ago by Judge Campbell, a distinguished federal trial judge. In *United States v. Wiley* ¹¹⁸ the judge repeated the oft heard refrain: "Those factors which motivate the trial judge . . . are, for the most part, difficult to determine by a reviewing court because of their obvious subjective qualities." ¹¹⁹ The judge did not explain what these factors are or why judges must or should rely on them in reaching their sentencing deci-

their scores on 3 tests. They next gave the same information, plus 18 other assumed relevant items, such as age, sex, marital status, major, hours of part time work, father's education, reading speed and comprehension, and six other test scores. In every case, the psychologists predicted significantly more accurately with fewer items of data, though they were more confident of their predictions made with the greater amount of data.

117. *Id.* at 270.

118. 184 F. Supp. 679 (N.D. Ill. 1960).

119. *Id.* at 683.

sions. Elsewhere in his writings, however, he provided a clue, asserting that sentencing decisions rest on "the judge's own set of convictions toward a special kind of offense; toward a certain economic or social class; toward certain religious, or racial groups; toward a set of moral, religious, or ethical principles which he may possess."¹²⁰

If by attitudes towards religious or racial groups, Judge Campbell means that judges sentence on the basis of a belief that certain religions or races are morally superior to others, then this personal value preference seems clearly inappropriate. If, as seems more likely, he means that judges sentence on the basis of a belief that certain religious or racial groups are, statistically, more likely to recidivate, then this "subjective" factor constitutes an assumption of fact that may or may not be accurate and relevant. Both its relevancy and accuracy should be open to question, not hidden under a veil of judicial discretion.

Judge Campbell himself relied on a series of "facts" when he imposed the sentence at issue in *Wiley*. He asserted, for example, that Wiley, who apparently had no criminal record, "was involved in [another] burglary" and that he "perjured himself when he testified that he had helped to dispose of any other stolen merchandise."¹²¹ He also asserted a different kind of fact: that defendants who plead guilty "generally" are repentant and that the defendants who pleaded guilty in this case, all of whom had criminal records, "did stand conscience-stricken in repentance before the Court."¹²² The judge relied on these "facts" in arriving at his predictive conclusions that "Wiley . . . will go back to his underworld friends without remorse and will continue to infect and disease our society," whereas the other defendants "have greater prospects of rehabilitation."

Certainly, Judge Campbell honestly assumed that these predictions, based on twenty years of judicial experience, were correct. Twenty years of experience, however, is often only one year of experience repeated twenty times. The unknown mistakes of the past become the foundation for a confident, but erroneous, prediction of the future. This was demonstrated many years ago in a famous "experiment" conducted by the Harvard psychologist Thorndike who had a student throw darts repeatedly at a board to test the thesis that aim improves with "experience." Thorndike blindfolded the student, however, and

120. Campbell, *Developing Systematic Sentencing Procedures*, 18 FED. PROB. 3, 6 (Sept. 1954).

121. 184 F. Supp. at 686.

122. *Id.* at 687.

Preventive Confinement

never told him when he hit or missed. Needless to say, the student's aim did not improve with "experience." Nor does the accuracy of a judge's predictions improve simply as a result of spending more and more years meting out untested sentences. In this case, for example, had Judge Campbell removed his judicial blindfold, he would have learned that his predictions have apparently turned out wrong in every respect. He predicted that Wiley would "go back to his underworld friends without remorse and will continue to infect and disease our society."¹²³ A followup letter from the United States Bureau of Prisons, however, states that "Wiley has evidently stayed out of trouble since the decision"¹²⁴ Judge Campbell also predicted that the other defendants "have greater prospects of rehabilitation than Wiley."¹²⁵ The same communication from the Bureau of Prisons, however, indicates that each of the other defendants has been arrested on at least one occasion since release from jail and that one has been arrested six times and is now serving a sentence for burglary. It is likely that to this day Judge Campbell does not know how wrong he was. He continues to throw his judicial darts without once pausing to lift the protective blindfold that insulates him from knowledge of his errors.

Since predictions are no more accurate than the "facts" upon which they rest, nothing more could be expected of Judge Campbell's prediction. In addition, since accurate prediction requires both correct historical facts and a verified predictive theory, accurate factfinding alone does not guarantee valid predictions. Nonetheless, correct facts are at least one necessary element of reliable forecasting; so facts should not be used unless the truthtesting safeguards of the adversary process have verified their reliability. Consider, for example, Judge Campbell's reliance on Wiley's alleged participation in an earlier burglary and his perjury at the trial. The basis for these "facts" was a secret report by unidentified "government investigators" that was not part of the record of the case. If Wiley had been tried on the burglary and perjury charges, the Government would have had to establish the truth of these historical facts. No court in any Anglo-American jurisdiction would tolerate a judge's reliance on secret *ex parte* gossip to determine guilt. Yet in this case, when the accuracy of the prediction depended on the accuracy of the very same facts, the court had no embarrassment about boasting of its reliance on such "evidence."

123. *Id.*

124. Letter to Alan Dershowitz from John P. Conrad, Chief of Research, Bureau of Prisons, United States Department of Justice, Mar. 28, 1968.

125. 184 F. Supp. at 688.

Despite its broad language, the *Williams* decision itself lends little support to the type of judicial subjectivity in which Judge Campbell indulged. On the contrary, the *Williams* Court carefully pointed out that the defendant there had not challenged the accuracy of the facts on which the trial judge relied in passing sentence. This narrower reading of *Williams* only allows the trial judge discretion to consider accurate information in making his subjective, predictive sentencing decision. *Townsend v. Burke*,¹²⁶ decided just one year prior to *Williams*, supports this narrower view. In *Townsend* the trial judge recited the defendant's alleged criminal record, which included a charge of "receiving stolen goods, a saxophone." He then asked the defendant: "What did you want with a saxophone? Didn't hope to play in the prison band then did you?" Before the uncounseled defendant could answer, the Judge said: "Ten to twenty in the Penitentiary." As it happened, the defendant had never been convicted of the saxophone charge, nor of two other charges that his record reflected. This egregious error, the Court held, and the absence of counsel to correct it, combined to deprive the defendant of due process.¹²⁷

In this fashion the Supreme Court has given guidance at the polar terminals of sentencing discretion. The sentencing judge may rely on concededly true material facts regardless of their source and without cross-examination. When these facts are "extensively and materially false," however, and when the defendant has had no effective opportunity to challenge them, the sentence may not stand. Unfortunately, neither of the polar cases controls the typical situation. Most frequently, the underlying facts appear only in the presentence report; the trial judge generally does not recite them in open court, nor do they otherwise become part of the record. Therefore, unless the defendant and his attorney have access to that report, they cannot know what facts the trial judge has relied on in passing sentence. Since in many jurisdictions the presentence report remains a secret document, the defendant can rarely contest the truth of the facts that it contains.

Though many sentencing judges insist that disclosure of the contents of presentence reports, even to appellate judges, "would trench on proper judicial prerogatives,"¹²⁸ their arguments for secrecy do not withstand analysis. Often they assert that disclosure of reports will

126. 334 U.S. 736 (1948).

127. *Id.* at 741.

128. Parsons, *The Presentence Investigation Report Must Be Preserved as a Confidential Document*, 28 FED. PROB. 3 (Mar. 1964).

inhibit individuals from coming forward with information about the defendant.¹²⁹ Those few courts that routinely disclose the factual underpinnings of the sentence recommendation, however, have experienced little restriction of information.¹³⁰ Moreover, even if disclosure reduced the quantity of information available, any change in the accuracy of predictive judgments would depend on the quality of the information that disclosure denied the courts. If that sort of information would tend on the whole to be less credible and relevant than information capable of withstanding disclosure and challenge, which seems likely, then the accuracy of the predictions might even increase as the amount of information available to the judge decreases.

Judges have also argued that disclosure would permit counsel to "denigrate the [experts'] submissions and recommendations."¹³¹ This contention, too, lacks merit. The Supreme Court considered it in *Kent v. United States*¹³² and held, in the context of juvenile court records, that it was "precisely the role of counsel to 'denigrate'" matters susceptible to challenge or impeachment.¹³³ In the last analysis, however, fundamental fairness, rather than accuracy or efficiency, requires disclosure of presentence reports. It is simply unfair for judges to make the critical sentencing decision on the basis of ex parte information that the defendant has had no opportunity to confront and contest.

2. *Psychiatric Predictions.*—Psychiatric predictions also rest on a superstructure of underlying facts, as the case of Leroy Peterson illustrates.¹³⁴ A policeman, while staking out an area of Boston where a series of rapes had occurred, observed a masked man emerge from a car and approach another car in which a couple was seated. After the man spoke to the couple they got out with their hands up. When the policeman attempted to intervene, a fight ensued and the masked man fled. Shortly thereafter, the policeman attempted to arrest Mr. Peterson as the assailant. Mr. Peterson vehemently denied the charge and fought back. During the scuffle the officer subdued his quarry,

129. *United States v. Durham*, 181 F. Supp. 503 (D.D.C. 1960); *Parsons*, *supra* note 128, at 4-5.

130. *Lehrick, The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225, 239 (1969). *But see Parsons*, *supra* note 128, at 5.

131. *Kent v. United States*, 343 F.2d 247, 258 (D.C. Cir. 1964), *rev'd*, 383 U.S. 541 (1966).

132. 383 U.S. 541 (1966).

133. *Id.* at 563.

134. *Peterson v. Gaughan*, 404 F.2d 1375 (1st Cir.), *aff'g* 285 F. Supp. 377 (D. Mass. 1968); *In re Peterson*, 354 Mass. 110, 236 N.E.2d 82 (1968); *Commonwealth v. Peterson*, 348 Mass. 702, 205 N.E.2d 719 (1965), *cert. denied*, 384 U.S. 909 (1966).

but sustained a broken hand. The officer attempted to secure identification of Peterson from the couple, but they had vanished and were never located. Peterson was never charged with an assault on the couple, but he did plead guilty to assault and battery with a deadly weapon on the policeman and was sentenced to imprisonment for five years. While serving this sentence Peterson, though never charged with sexual misconduct, was examined by two psychiatrists who concluded that he was a sexually dangerous person.

Notwithstanding the absence of charges against Peterson, the first psychiatrist assumed that he had committed the series of rapes and based his diagnosis on that assumption.¹³⁵ Adding a Kafkaesque touch, the psychiatrist further attributed pathological significance to Peterson's steadfast denial of any wrongdoing.¹³⁶ The second psychiatrist, however, took a different tack. He diagnosed Peterson as sexually dangerous on the basis of a forty-minute interview. Although he was aware that the police suspected Peterson of several sexual assaults, he contended that he could safely ignore—and had in fact disregarded—the truth or falsity of this suspicion in predicting Peterson's propensity to commit sex crimes in the future.

Perhaps some extraordinarily gifted psychiatrist can predict future behavior accurately on the basis of clinical insight gained from a brief

135. He stated, for example, that:

in July of 1962 a 24 year old girl was raped in her apartment by a masked man who threatened to kill her baby. Now, this girl lived at 86 Washington Avenue, Chelsea. And on that very day the subject had visited his wife at 80 Washington Avenue, Chelsea. These are the things, your Honor, we took into consideration Now, we felt that despite the lack of convictions, this man has a potential for sex crimes. The description of these offenses are all similar. [And] we felt it was the same man because the implications are so strong they can't be ignored.

Transcript of Proceedings at 28-29, *Commonwealth v. Peterson*, No. 3880 (Super. Ct. Suffolk, Mass., Oct. 3, 1963). When cross-examined about the absence of any conviction for sexual crimes, the psychiatrist turned detective responded: "[H]e has been saved by the failure of the victims to identify him He was not convicted because no one could identify him. He was masked." *Id.* at 32.

136. *Id.* at 25.

Further examples abound. See, e.g., Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 *SOCIAL SERV. REV.* 107 (1960). Professor Allen describes the result of a California case:

A defendant was convicted of a sexual offense. Subsequently he was committed as a sexual psychopath following a psychiatric examination. In making their diagnosis the psychiatrists *assumed* that the defendant had committed the sexual acts which provided the basis for the criminal conviction. The difficulty was that, as later established, the defendant had all along been the victim of misidentification. Thus, the mistake as to the facts not only resulted in an improper conviction but rendered invalid the psychiatric judgment of the defendant's personality and propensities.

Id. at 117 (emphasis in original) (footnote omitted).

interview or a battery of psychological tests, without regard to past conduct. Since not all psychiatrists are so gifted, however, predictions based on past conduct possess a far greater probability of accuracy than those that rely only on clinical insight. Experience indicates, for example, that those who have committed sexual assaults in the past, but whose psychological tests appear normal, are more likely to commit rape in the future than those whose psychological tests show a propensity for violence, but who have never committed a sexual assault in the past.¹³⁷ Perhaps Peterson was the rapist and perhaps he was "saved by the failure of the victims to identify him," as the first psychiatrist put it. But why should this critical fact not be established in the same manner as other critical facts, and why should the law deputize the psychiatrist, rather than the jury, to perform this factfinding function?

B. A Catalogue of Safeguards

1. *Rules of Evidence.*—Not all evidentiary restrictions need automatically apply to every type of predictive determination. The function of the restriction should be evaluated against the purpose of the determination. Restrictions that reflect doubt about the accuracy of certain types of evidence, such as the hearsay rule, should apply to predictive determinations with as much vigor as they do to postdictive determinations. If the introduction of hearsay evidence would decrease the accuracy of postdictive determinations, then it probably would have a similar effect on the accuracy of predictive decisions. Contrast this, however, with the prohibition against introducing evidence relating to other crimes committed by the person on trial. The policy behind this restriction is that when a person is charged with a given crime, the fact finder is supposed to decide only whether he committed the specific crime of which he stands charged. The fear underlying the exclusion of evidence of other crimes is that the jury will really ask itself whether the defendant is a bad man deserving of punishment or a dangerous man in need of isolation, without regard to whether he actually committed the particular crime at issue. A long criminal record may be relevant to whether he committed this crime, but the judgment of

137. This is one of the very few constants in the variable-ridden field of psychiatric prediction of future criminal behavior. See S. POLLACK, *MANUAL ON THE SEX OFFENDER AND THE LAW* § 4.3, at 190 (1972).

Professor Allen also reached this conclusion: "However advanced our techniques for determining what an individual *is*, we have not yet approached the point at which we may safely ignore what he has done. What he has done may often be the most revealing evidence of what he is." Allen, *supra* note 136, at 117.

time has been that the accuracy of determining specific charged crimes will decrease if evidence of other crimes is admitted.¹³⁸ The exception in cases where a course of similar conduct establishes a *modus operandi* or pattern indicates that this is the restriction's primary purpose. In those cases the evidentiary value of the other crimes is sufficiently compelling to outweigh their possible prejudicial effect.¹³⁹

The policies behind enforcing this rule diminish in the context of predictive judgments. An individual's history provides an important basis for predicting his future conduct. Thus although the risk still exists that the fact finder will use a history of past crimes to assess a person's "wickedness," rather than his dangerousness, the crucial relevance of the subject's history—particularly if it involves acts similar to those being predicted—outweighs this likely prejudice. For this reason the restriction need not apply to predictive judgments with the same vigor that it applies to determinations of past crimes.

Evidentiary restrictions that preserve values other than truth—values such as privacy and dignity—present entirely different considerations. The fourth amendment exclusionary rule, for example, attempts to deter illegal police action. It has been argued that this rationale does not require exclusion in "civil" suits, since the police, having no stake in the suits' outcome, would not be deterred by the exclusion.¹⁴⁰ This argument might have some force in purely private civil proceedings, such as divorce actions. But it surely has no force when the state is a party to the "civil" proceeding and is seeking a sanction similar in many ways to criminal punishment. In all such proceedings—whether labeled criminal, civil, or nonadversary—the exclusionary rule should operate in exactly the same way as it does in criminal prosecutions.

The rule excluding testimonial evidence obtained in violation of the fifth amendment is far more complex in both purpose and scope. Accordingly, it presents more complex questions. The fundamental question is whether courts may compel the subject of a predictive proceeding to answer questions that, while not exposing him to ordinary criminal prosecution, may lead to his "civil" confinement. To answer that question courts must determine whether increasing the possibility of civil confinement constitutes "incrimination" within the meaning of the privilege. The fifth amendment does not apply to all sanctions.

138. 1 J. WIGMORE, EVIDENCE §§ 192-94 (3d ed. 1940).

139. See C. MCCORMICK, EVIDENCE § 190 (2d ed. 1972).

140. See, e.g., *id.* at § 167.

Preventive Confinement

A person may not decline, for example, to answer a question on the ground that it will lead to tort liability or even financial bankruptcy. In *Gault*, however, the Court held that the privilege does cover "exposure" to a determination of delinquency "which may lead to commitment to a state institution" ¹⁴¹ The Court's ambiguous reasoning leaves open the question whether the privilege also covers other types of civil confinements. Some narrow language suggests a limitation to determinations of past delinquency culminating in confinement with criminals. Other language, however, suggests application to any incarceration against one's will, whether it is called "criminal" or "civil."

Some courts have continued to hold the privilege inapplicable to compelled civil confinements. In one New York case, decided after *Gault*, the appellate division held the privilege inapplicable to an addict commitment proceeding, which it deemed "nowise penal in nature." ¹⁴² The court's logic, however, was less than compelling. "There can be no question," it said, "if we are to have any system of compulsory treatment at all, that a medical examination must be had . . . and no medical examination can be complete, or can serve any useful purpose unless the alleged addict responds to questions that are essential in order to make a proper diagnosis." ¹⁴³ The Supreme Court's most recent discussion of the issue, in the context of a defective delinquency proceeding against an inmate who refused to cooperate with his medical examiners, explicitly left the issue open. ¹⁴⁴

Even if the courts were ultimately to decide that the privilege applies to civil confinements, difficult problems would still remain. Consider, for example, whether the privilege applies to questions put by a psychiatrist or psychologist who claims interest not so much in the substantive truth or falsity of the answer as in the manner with which it

141. 387 U.S. at 49.

142. *In re James*, 29 App. Div. 2d 72, 75, 285 N.Y.S.2d 793, 797 (1967), *rev'd on other grounds*, 22 N.Y.2d 545, 240 N.E.2d 29, 293 N.Y.S.2d 531 (1968). In reversing the court of appeals did not reach the question of fifth amendment privilege; instead it relied on the violation of fourteenth amendment due process involved in detention without notice and a hearing:

Having concluded that the temporary detention of the appellant violated his constitutional rights, it must necessarily follow that the subsequent determination that the appellant was an addict, which was based almost entirely on information obtained during the period of illegal detention, must be set aside.

22 N.Y.2d at 553, 240 N.E.2d at 33, 293 N.Y.S.2d at 537.

143. 29 App. Div. 2d at 77, 285 N.Y.S.2d at 799.

144. *Murel v. Baltimore Court*, 407 U.S. 355 (1972) (dismissing certiorari as improvidently granted). *See also McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972).

is given—the affect, choice of words, or responsiveness. The cases hold that the privilege does not apply to “nontestimonial” compelled speech—talking for purposes of voice identification, for example¹⁴⁵—but the application of this principle to those aspects of a psychiatric interview or psychological test that resemble “demeanor” evidence raises far more complex issues.¹⁴⁶ However courts resolve them, the privilege ought nonetheless to apply at least to answers whose substantive content may lead the psychiatrist to recommend confinement.

The analogy to demeanor evidence leads directly to the second question of whether the subject of a predictive proceeding may refuse to testify at his trial (as may the defendant in a criminal prosecution), or must take the stand and invoke the privilege only in response to particular questions that expose him to the risk of confinement (as must a participant in a noncriminal proceeding). This question becomes particularly important in civil commitment cases when the government calls the “patient” to the witness stand in order to demonstrate that he is “crazy.” In effect, the patient serves as an exhibit rather than a witness, and the prosecution often asks questions designed to provoke outbursts or expose a delusional system, rather than to induce substantively incriminating answers.

2. *Jury Trial.*—Courts have frequently denied trial by jury in predictive determinations such as commitment of the mentally ill and juvenile delinquency proceedings.¹⁴⁷ The civil label, of course, is not enough to support this denial, since in addition to the sixth amendment, the seventh amendment requires trial by jury in “suits at common law, where the value in controversy shall exceed twenty dollars”¹⁴⁸ Moreover, historical evidence suggests that at about the time the Constitution was adopted some colonies provided a jury trial in noncriminal proceedings that could lead to involuntary confinement.¹⁴⁹ Furthermore, during that period, young persons charged with crime were entitled to a trial by jury.¹⁵⁰ Nonetheless, in *McKiver v.*

145. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967).

146. See, e.g., *California v. Byers*, 402 U.S. 424 (1971).

147. E.g., *In re Gurland*, 286 App. Div. 704, 146 N.Y.S.2d 830 (1955) (mental); *In re Fletcher*, 251 Md. 520, 248 A.2d 364 (1968), cert. denied, 396 U.S. 852 (1969) (juvenile).

148. The Supreme Court has not, however, applied this requirement to the states. C. WRIGHT, *LAW OF FEDERAL COURTS* § 92, at 403 (2d ed. 1970).

149. See *SOURCES OF OUR LIBERTIES* 154, 330, 356, 366, 376, 404 (J. Cooper & R. Perry eds. 1959).

150. See, e.g., *Robinson v. Wayne Circuit Judges*, 151 Mich. 315, 115 N.W. 682 (1908). But see *In re Johnson*, 254 Md. 517, 255 A.2d 419 (1969), appeal dismissed, 403 U.S. 926 (1971).

Pennsylvania,¹⁵¹ the Supreme Court authoritatively decided that the Constitution did not require a jury trial in the adjudication stage of a juvenile proceeding. The opinion's reasoning suggests that the Court will not require a jury trial in other predictive proceedings leading to confinement.¹⁵²

Mr. Justice Blackmun, writing for the Court in *McKeiver*, catalogued thirteen independent "reasons" for denying trial by jury in juvenile delinquency proceedings. At bottom, these arguments duplicate those generally made against trial by jury in criminal proceedings. Granting the right, the Court said, "would bring along with it . . . the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial".¹⁵³ The Court's reasoning implies that trial by jury would create an adversary situation where none exists today. In truth, however, it would merely recognize the existing adversary situation and require a time tested method of resolving that conflict. When a white, middleclass policeman charges a sixteen-year-old urban black with assaulting him, and the youth responds that the policeman beat him up, the question is not whether an adversary situation exists, but how to resolve it. The Court's opinion in *McKeiver* begs that important question.

If it is acknowledged that the decision to confine someone on the basis of a prediction is a social policy judgment to be made by the community and not the expert alone, a compelling argument emerges supporting the right to trial by jury in preventive confinement cases. The analogy to the criminal law is persuasive. In both instances the legislature determines the types and degrees of harm sufficiently serious to warrant intervention; experts often aid the fact finder in determining whether the facts meet the legislative standard; and the fact finder should be the jury. The need for trial by jury is particularly persuasive if the legislature has not really faced up—as is often the case when confinement is based on prediction—to the social policy issue involved in establishing standards. If these decisions about risks and freedom are to be abdicated, in a democratic society it is better that it be abdicated to a jury than to a psychiatrist or a judge. Moreover, trial by jury requires a judicial articulation and elaboration of the criteria for confinement. In a trial without a jury, judges often state their conclu-

151. 403 U.S. 528 (1971).

152. Equal protection may, however, require a jury trial under some circumstances. See *Baxstrom v. Herold*, 383 U.S. 107 (1966).

153. 403 U.S. at 550.

sions in the bare language of the statute. In a jury trial, on the other hand, the judge must instruct the jury on the meaning of the statutory criteria. These instructions are often appealed and this sets in motion the common law process of appellate consideration and construction of the statute's operative phrases. This healthy process has been sorely missed in the area of preventive confinement and the denial of trial by jury discourages its introduction.

Trial by jury also imposes a barrier to "judicial whispering," a phenomenon that plagues predictive proceedings. Prosecutors often manage to convey to the judge—informally and off the record—the "real" basis for the confinement, which may often differ from the formal one. But no one can whisper to the jury. The jury must be openly and formally charged and may hear only evidence that is a matter of record. If the judge gives an improper charge or admits inadmissible evidence, the process is subject to appellate review. Accordingly, trial by jury is at least as important in predictive determinations as in retrospective determinations.

IV. Developing Approaches

Courts have recently taken two approaches to the applicability of procedural safeguards to predictive proceedings that, while not involving a labeling game, have generated much confusion. The first revolves around equal protection; the second, around the "right to treatment." The equal protection approach, which the Supreme Court has employed in several recent cases, basically requires the state to provide identical safeguards to similarly situated individuals. Thus, for example, if the state normally allows a jury trial at one type of predictive proceeding that can result in involuntary hospitalization, it may not deny trial by jury to a prison inmate who is the subject of a similar proceeding, unless it can convince a court that the proceedings or confinements are distinguishable.¹⁵⁴ Since the requirement for the safe-

154. *Baxstrom v. Herold*, 383 U.S. 107 (1966). See *Humphrey v. Cady*, 405 U.S. 504 (1972), where a prisoner was serving a term in the "sex deviate facility" of the state prison in lieu of sentence. The prisoner claimed that the hearing for a five-year renewal order after the expiration of his one-year maximum sentence was the equivalent of a hearing for compulsory commitment under the Wisconsin Mental Health Act, WIS. STAT. ANN. §§ 51.001-.50 (1957). Since WIS. STAT. ANN. § 51.03 (1957) provided for the right to trial by jury in involuntary commitment proceedings, he claimed that his deprivation of a jury trial constituted a violation of the equal protection clause. The court held that the prisoner's claims were "at least substantial enough to warrant an evidentiary hearing." 405 U.S. at 508.

Preventive Confinement

guard does not rest on due process, however, the state may choose between two options: it may authorize the safeguard for the second class of inmates, or it may eliminate it for the first class.¹⁵⁵ Some states, therefore, may well respond by decreasing, rather than increasing, safeguards. Arguments have already been made against legislative enactment of trial by jury in civil commitment proceedings in one state, on the grounds that providing this safeguard to that class of confined inmates would open the door to an equal protection challenge by other classes of confined inmates.

The "right to treatment" approach accords that right to those whom the state has confined involuntarily, without adequate procedural safeguards, on the grounds that only the promise of treatment justifies relaxation of safeguards.¹⁵⁶ The argument, however, begs the central question. Both the confinement and the treatment are involuntary. If the inmate wanted inpatient treatment, presumably he would volunteer for it. If he continues to oppose confinement, even when the state assures treatment, then the proceeding remains adversary. The conventional answer is that, while confinement benefits only the state, confinement-cum-treatment benefits the inmate as well, though he may not realize it. This logic, however, carries too far. It could readily justify any imprisonment accompanied by treatment or rehabilitation. Indeed, involuntary confinement coupled with involuntary treatment may well constitute a more significant deprivation of liberty—at least to certain inmates—than involuntary confinement absent treatment.¹⁵⁷ However courts resolve this question, it is difficult to conceptualize an argument that would authorize fewer safeguards when institutions provide treatment than when they do not.

A three judge federal district court recently employed a more direct approach in striking down Wisconsin's commitment laws. In *Lessard v. Schmidt*¹⁵⁸ the court held that due process required the state to provide the subject of civil commitment proceedings with many of the basic constitutional safeguards required in criminal proceedings.

155. See *Jackson v. Indiana*, 406 U.S. 715, 723-30 (1972).

156. For an analysis of the constitutional problems of this approach see *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

157. See, e.g., KATZ, GOLDSTEIN & DERSHOWITZ, *supra* note 32, at 713-20; Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 92-95 (1968); cf. *Haynes v. Harris*, 344 F. Supp. 463 (8th Cir. 1965).

Sometimes, of course, those involuntarily committed accept or even seek treatment. For a consideration of the difficulties in determining the voluntariness of treatment under these circumstances, see N.Y. Times, Apr. 2, 1973, § 1, at 19, col. 1.

158. 349 F. Supp. 1078 (E.D. Wis. 1972).

Since civil commitment proceedings could result in the loss of basic civil rights, the court held that these proceedings require, *inter alia*, notice and opportunity to be heard; proof beyond a reasonable doubt; right to counsel; privilege against self-incrimination; and exclusion of hearsay evidence. Trial by jury was not specifically at issue, since Wisconsin law provided that safeguard,¹⁵⁹ but the court did say that a committed patient must be informed of "his right to jury trial."¹⁶⁰

The court rejected only the right of the patient to have his lawyer accompany him at the psychiatric interview. It acknowledged that this issue posed a difficult choice between the state's interest in an efficient examination, which it thought the presence of counsel would impair, and the patient's interest in properly exercising his rights of cross-examination. Although the court recognized that the psychiatric interview constituted a critical phase of the proceedings it struck the balance in favor of the state. In doing so, the court neglected another of the patient's interests. Not only will counsel's absence from the psychiatric interview impair his ability to cross-examine the physicians at trial, but more important, that absence will undermine the patient's acknowledged right to refuse to answer questions that might lead to his confinement.

The arguments favoring exclusion of counsel at the psychiatric interview are analogous to those put forward by the police in opposition to the *Miranda* ruling regulating the interrogation of criminal suspects. There too, the presence of counsel "severely limit[s] the efficacy of the examination"¹⁶¹—indeed, that is an important part of the function of the privilege. If a patient has a privilege not to make statements which might lead to a deprivation of his liberty—as the *Lessard* court held—then the right to counsel's ongoing advice, whenever government agents question him in an in-custody setting, should follow. The *Lessard* court's conclusion reaches an uncomfortable compromise, affording the right, but denying the most effective means for its implementation.

Despite this important compromise, *Lessard* goes a long way toward applying criminal law safeguards to predictive decisions that

159. WIS. STAT. ANN. § 51.03 (1957).

160. 349 F. Supp. at 1092. The court also observed that "[t]he right to a jury trial has been shown to be critical, numerous studies indicating that the exercise of that right may well mean the difference between release and confinement." *Id.* at 1100.

161. *Id.* at 1100, quoting *United States v. Albright*, 388 F.2d 719, 726 (4th Cir. 1968).

Preventive Confinement

may culminate in confinement. It is not clear at this juncture which approach will dominate: equal protection, right to treatment, or due process. It is clear, however, that courts will continue to confront these important issues over the next generation.

V. Proportionality

Courts will also be confronted with the need to define the "substantive constitutional limitations"¹⁶² on the power to confine persons on preventive grounds. Among other basic questions, the courts must decide whether the Constitution requires proof of a prior act as a prerequisite to at least certain forms of preventive confinement.¹⁶³ The Supreme Court's decision in *Robinson v. California*¹⁶⁴ may be relevant to this issue. Confused as the opinion is, its holding comes down to prohibiting the imposition of criminal punishment for a status or a "propensity" without proof of "irregular behavior" within the state's jurisdiction. Of course, the Court explicitly limited its decision to criminal punishment and took back most of what it had given by inviting the states to establish civil confinement programs. The Court thus played the legal labeling game—civil versus criminal—that it was to condemn five years later in *Gault*. Perhaps courts may ultimately apply the *Robinson* rationale to at least certain kinds of preventive confinement mechanisms. Some state legislatures and courts have already begun to do so. For example, some of the recently enacted insanity commitment laws—especially the Massachusetts¹⁶⁵ and California¹⁶⁶ statutes—require that the determination of dangerousness be tied to specific past conduct. A recent decision of the Maine Supreme Court, too, construed a preventive juvenile confinement sta-

162. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972).

163. Statutes allowing the quarantine of persons afflicted with contagious diseases would be one arguable exception to a rule forbidding preventive confinement. See, e.g., WASH. REV. CODE ANN. § 70.20.040 (1962), which provides that when a person has been infected with a disease which the municipal officers feel is dangerous to the public health, they may "remov[e] him or her to a separate house if it can be done without great danger to his or her health."

Some statutes, however, do require acts manifesting an unwillingness to remain out of public places as a prerequisite to involuntary quarantine. See, e.g., N.Y. PUB. HEALTH LAW § 2120 (McKinney 1971), which provides that whenever a person is infected with a communicable disease "and is unable or unwilling to conduct himself and to live in such a manner as not to expose members of his family or household or other persons with whom he may be associated to danger of infection," he may be investigated and, if necessary, quarantined.

164. 370 U.S. 660 (1962).

165. MASS. GEN. LAWS ANN. ch. 123, § 1 (Supp. 1973).

166. CAL. WELF. & INST'NS CODE §§ 5300, 5304 (West Supp. 1973).

tute to require "a pattern" of past conduct that clearly shows a "manifest danger of falling into habits of vice or immorality."¹⁶⁷

Conditioning preventive detention on proof of a specific act, and imposing vigorous procedural safeguards at the predictive hearing would significantly reduce the availability of the first two categories along the preventive continuum and would eliminate some of the worst abuses that attend those categories. The requirement of a prior criminal act to be proved in an adversary proceeding circumscribed by procedural safeguards would preclude the confinement of persons who had not committed such acts, or who were merely suspected of having committed them. These reforms, however, would leave intact the third category, in which a proven criminal act is required to trigger confinement, but in which the duration of the confinement is based on preventive considerations that include more than the past act. Thus, these reforms would still leave open the question that divided Judges Bazelon and Burger in the *Cross* case: whether the Constitution authorized the indeterminate confinement of a sex psychopath on the basis of past acts of exhibitionism and a prediction that he will engage in future acts of exhibitionism.

To confront this difficult problem, courts must realize that any civilized system of justice requires a relationship between the crime committed or predicted and the duration of the confinement authorized. Despite its hoary credentials, and comic potentials, the principle of "making the punishment fit the crime" is essential in a just society. Yet, at present, the courts have barely adumbrated this concept of proportionality in the area of pure criminal punishment, and most have rejected it entirely for civil or quasi-criminal confinements.¹⁶⁸

In *In re Lynch*,¹⁶⁹ however, the California Supreme Court recently rendered a decision that may have broad implications for disproportionate confinement of any sort. That case, like *Cross*, involved a man convicted of an act of exhibitionism—a crime generally punish-

167. *S****S**** v. State*, 299 A.2d 560, 569 (Me. 1973).

168. Until recently, for example, the California courts had repeatedly held that California's Sexual Psychopath Act, CAL. WELF. & INST'NS CODE §§ 5500-22, *as amended*, CAL. WELF. & INST'NS CODE §§ 6300-30 (West 1972), did not violate the cruel and unusual punishment clause. As one court said:

The emphasis that appellant places on the fact that he was originally convicted of a misdemeanor, and now finds himself in San Quentin, possibly for life, is misplaced. The argument would be sound only were his confinement punishment. The purpose of the confinement is to protect society and to try and cure the accused.

People v. Levy, 151 Cal. App. 2d 460, 468, 311 P.2d 897, 902 (1957).

169. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

able by a short prison term. Under the California indeterminate sentence law,¹⁷⁰ a second conviction for this offense carries an indeterminate sentence of one year to life. Lynch, a second offender, was so sentenced.¹⁷¹ In declaring his indeterminate sentence unconstitutionally cruel and unusual because "disproportional," the California court noted that it "not only fail[ed] to fit the crime, it [did] not fit the criminal"¹⁷² Though the decision is limited to indeterminate sentences, its logic seems readily applicable to other forms of preventive confinement.

Constructing a theory of proportionality has intrigued and eluded mankind since the beginning of recorded history. The Biblical "eye for an eye, tooth for a tooth" reflects at once the need for proportionality and the difficulty of going beyond simplistic symmetry. However difficult it is to construct a theory of proportionality for past crimes, it is more difficult still to apply a theory of proportionality to preventive confinement. To *what* must the duration and severity of the confinement be proportional? To the past harm actually caused? To the past danger threatened? To the future harm predicted? To the actor's culpability?

The *Lynch* case, and the *Cross* case that divided Chief Justice Burger and Chief Judge Bazelon, were easy from the viewpoint of proportionality. In those cases neither the past crime nor the predicted future act warranted long term confinement: exhibitionism is just not serious enough in an open and heterogeneous society such as ours to warrant life imprisonment. But how would the courts have responded—indeed, how should they have responded—if respected experts had reliably predicted the defendant was very likely to engage in future acts of rape or murder? Psychiatrists frequently make such predictions—with little basis in fact or experience—today. Assume, for a moment, that they could be made reliably—not with the cer-

170. CAL. PENAL CODE § 1168 (West 1970). This statute provides that anyone who is convicted of a crime punishable by imprisonment in any reformatory or state prison (unless the sentence is suspended, probated, or a new trial granted) shall "be sentenced to be imprisoned in the state prison, but the court imposing the sentence shall not fix the term or duration of the period of imprisonment." Other sections of the Code set out the procedures for the later review and fixing of duration of the sentence. See, e.g., CAL. PENAL CODE §§ 1203, 5077 (West Supp. 1973).

The indeterminate sentence statute itself has repeatedly withstood allegations of unconstitutionality. See, e.g., *People v. Kostal*, 159 Cal. App. 2d 444, 323 P.2d 1020 (1958).

171. 8 Cal. 3d at 413-14, 503 P.2d at 922-23, 105 Cal. Rptr. at 218-19. His first sentence was suspended.

172. *Id.* at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235.

tainty of the dangerousness meter—but with a degree of certainty approximating that which we demand of the criminal process. How should the courts respond?

Difficult as it is, the courts must begin to develop and apply theories of proportionality. A just society simply cannot act without a sense of proportion when it deprives some of its citizens of their liberty for the good of the rest of us. When the courts do begin to confront the issue of proportionality, they will, unfortunately, have little guidance from the academy. These kinds of problems have not captured the imagination of legal scholars, and for understandable reasons. The tools of the law—and of the law schools—are better suited to fashioning procedural safeguards, than to probing philosophical questions of just dessert. Problems of proportionality raise questions that are eternal and unanswerable, but they are questions that every generation must ask anew.

VI. Conclusion

This article has suggested a framework for analyzing some of the constitutional problems—both procedural and substantive—raised by any system of preventive confinement based on predictions of future harm. Placing these problems in such a framework will not solve them. It is in the nature of these problems that they are not soluble, at least in any ultimate sense. No system of preventive confinement—even one with precise definitions, adequate procedures, and a requirement of past misconduct—will be free of substantial costs and sacrifices of other important values. All that any framework can hope to do is to help clarify and articulate the nature and extent of the values at stake.

Then the weighing process must begin; a just balance must be struck between the legitimate interests of crime prevention and the equally legitimate interests of individual liberty. In striking this balance, we must not forget that a sense of proportion is what separates us from the savages.